COMMENTS

STRENGTHENING HUMAN RIGHTS PROTECTION: WHY THE HOLOCAUST SLAVE LABOR CLAIMS SHOULD BE LITIGATED

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My parents are the only other people who completely understand what it has taken to get to this point in my education; no parent could have done more and I can not thank them enough for always being there for me. To my grandparents and all my family who suffered during WW II, this is my tribute to you.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights . . . . Spurred first by the Great War and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior . . . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest . . . . Indeed, for purposes of *civil liability*, the torturer has become-like the pirate and slave trader before him-*hostis humani generis*, an enemy of all mankind.[1]

I. The Pollack Case as Model for other Human Rights Cases

On August 30, 1998, sixteen people filed a class-action suit in the United States District Court of New York for the Eastern District alleging overwhelming violations of human rights, such as torture, humiliation, and conversion of labor.[2] The complaint chronicles the sixteen plaintiffs' experiences during the Holocaust[3] and alleges that the defendants, German corporations now doing business in the United States, conspired with Hitler's government to enslave them.[4] Helene Pollack, the first plaintiff named in the complaint, and the others, allege that the Nazis made the plaintiffs suffer at the hands of the corporations by forcing them

1. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

2. *See* Class Action Complaint 1, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

3. *See id.* at 3-12 (listing each plaintiff's individual experiences in concentration camps during WWII).

4. *See id.* at 1-2 (describing the cause of action as illicitly profiting from forced labor).

to work for the defendants.[5] The *Pollack* plaintiffs further allege that these corporations profited from their labor without ever compensating their victims.[6]

Each of the defendants is organized under the laws of Germany or Austria.[7] According to the plaintiffs' allegations, however, the corporations have significant business ties to the United States, thereby bringing them within the jurisdiction of United States courts.[8]

On the heels of the *Pollack* suit, and others like it, a dozen German companies have obligated themselves to contribute monies into a general fund to compensate their World War II (WWII) slave laborers.[9] Some of the companies involved in the general settlement are the same companies named as defendants in the *Pollack* suit.[10] The companies involved in setting up the fund, are committed for various reasons. One unifying goal, however, is to block suits like *Pollack* from continuing in the jurisdiction of U.S. courts.[11] For example, Deutsche Bank, a possible defendant in the *Pollack* case, is in the midst of acquiring Bankers Trust, a U.S. bank.[12] Jewish groups have threatened to block the take over if Deutsche Bank does not join in the settlement.[13] For German businesses as a whole, the bad publicity from the lawsuits is threatening their export reliant industries.[14] Nevertheless, some companies have expressed a moral

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5. *See id.*

6. *See id.*

7. *See id.* at 13-16 (describing each defendant-corporation, their subsidiaries, and their successors in interest individually). The defendants named in the suit are Siemens AG, Krupp AG, Henkel AG, Diehl & Co., Bayeriche Motoren Werke (BMW), Daimler-Benz AG, Allegemeiner Elektrik Gesellschaft AG (AEG), Telefunken AG, Messerschmitt, Volkswagen AG, Audi AG, Leica AG, Wurttembergische Metallwarenfabrik AG (WMF), and MAN AG. *See id.*

8. *See id.* at 2 (citing 28 U.S.C. § 1331 (1994) and 28 U.S.C. § 1332(a) (1994) as the basis for the court's jurisdiction).

9. *See* Tony Czuczka, *Slave Labor Fund Set* (visited Feb. 17, 1999)<http://abcnews.go.com/sections/world/DailyNews/nazi990217.html> (reporting the creation of a reparation fund by German companies like Deutsche Bank, Daimler-Benz, Daimler-Chrysler, and Siemens).

10. *See id.* (stating that it is still unclear how many German companies will contribute to the reparation fund).

11. *See id.* (emphasizing that German corporations are "seeking a U.S.-German accord blocking further legal action in the United States").

12. *See Talks on Establishing German Fund for Holocaust Victims Move Forward* (visited Feb. 10, 1999) <http://www.cnn.com/WORLDeurpoe/9902/09/germany.holocaust.02/index. html> (reporting that "Deutsche Bank [Germany's largest Bank] is seeking approval for a $10.1 billion merger with Banker's Trust, the eighth-largest U.S. bank").

13. *See id.* (citing Deutsche's recent disclosure that it helped build the Auschwitz death camp).

14. *See German Official to Push Holocaust Reparations Plan* (visited Feb. 8, 1999) <http://www.cnn.com/US/9902/07/BC-GERMANY-USA-HOLOCAUST.reut> (explain-

responsibility toward their former victims[15] and generally want to enter the twenty-first century with a clean slate.[16] It is ironic, however, that these companies are now taking this position; just a few decades ago these same companies' official positions were that they owed no duty to their former slaves.[17] Ed Fagan, one of the attorneys for the *Pollack* plaintiffs, has stated that more companies would have to contribute to the fund before the *Pollack* plaintiffs agree to non-suit.[18]

In this comment I propose that the plaintiffs resist being bullied by international organizations and litigate this case to its completion in a New York courtroom. A successful claim would be a step forward in the enforcement of human rights. With the precedent of a success in the *Pollack* case, any violator who commits a crime against humanity may be held responsible in the United States for their actions. The *Pollack* court has the opportunity to make the footprints that other federal courts, as well as other countries' judicial systems, should follow.[19]

The parties involved, with the awesome underlying history of WWII crimes behind them, are obligated by the moral mandates of history to properly preserve the legacy of the Holocaust. Today, monuments erected at the sites of Nazi concentration camps embody the legacy of the Holocaust as "Nie Wieder" (never again). Consequently, the proper legacy of the Holocaust is to never allow such a massive violation of human rights to happen again *to any people.*

This Comment stands for the proposition that the protection of human rights is the loftiest of all the world community's goals and that all nations

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ing that the push for a fund comes among "fears that Germany's export-reliant business interests could be severely damaged" and that "the lawsuits could be used by others to gain a competitive edge over German businesses").

15. *See* Terence Nelan, *Germany's Settlement Plan* (visited Feb. 17, 1999) <http://abcnews.go.com/sections/world/DailyNews/slavelabor981211_3.html> (reporting that German Chancellor Gerhard Schroeder has stated that German industry has a moral obligation to pay restitution); *Responsibility for the History of the Company* (visited Feb. 5, 1999) <http://www.daimler-benz.com/specials/zwangs/verantw_e.html> (commenting that Daimler-Benz has a moral responsibility toward its former forced laborers).

16. *See* Nelan, *supra* note 15 (quoting a historical expert who states that Germany wants to have its war time role finally settled by the end of the year).

17. *See* BENJAMIN B. FERENCZ, LESS THAN SLAVES 121, 230 (1979) [hereinafter LESS THAN SLAVES] (recounting how in 1962 Siemens stated that it had no legal or moral obligations towards its former victims).

18. *See* Czuczka, *supra* note 9 (reporting Fagan's statement that although the fund was "a step in the right direction," it still did not have the contribution of "all the industry" involved).

19. *See* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in Human Rights Litigation,* 39 VA. J. INT'L L. 41, 79-80 (1998) (arguing that the "United States has a strong interest in influencing the evolutionary process by which international norms emerge and are applied").

in the world community are charged with protecting human rights.[20] Holding human rights violators accountable to their victims is part and parcel to the task of ensuring that human rights are protected.[21] The world community, however, has not established an international tribunal which allows private victims to hold their oppressors accountable.[22] The lack of an international tribunal which strictly focuses on human rights violations leaves individual countries with the responsibility of enforcing

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20. The United Nations Charter, for example, encompasses the world community's goal of protecting an individual's human rights. *See* U.N. CHARTER art. 1, para. 3 (making the signatories of the U.N. Charter responsible for "achiev[ing] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"); Thomas C. Buergenthal, The Human Rights Revolution, Address Before the St. Mary's University School of Law Human-Rights Symposium (Feb. 15, 1991), *in* 23 ST.MARY'S L.J. 3, 5 (1991) (advancing the proposition that people all over the world now believe that it is the government's job to protect and respect human rights); Gare A. Smith, *A Human Rights Agenda for the Next Administration*, 3 ILSA J. INT'L & COMP. L. 653, 656-57 (1997) (explaining that since the end of the Holocaust there has been a special urgency in the global community to structure a system that protects human rights); *see also* André Douglas Pond Cummings, Note, *Just Another Gang: "When the Cops Are Crooks Who Can You Trust?"*, 41 HOW. L.J. 383, 386 (1998) (commenting that protecting human rights is an indispensable part of United States foreign policy).

21. *See* Colloquy, *The Prosecution of War Criminals & Violations of Human Rights in the U.S.*, 19 WHITTIER L. REV. 281, 293 (1997) (arguing that "one of the main tasks of those who work for human rights has been to ensure that human rights standards are implemented and enforced in the United States . . ."); Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 234 (1998) (warning that it is a spite to the victims and an urging of more atrocities when the world community condemns massive crimes, without bringing to justice those responsible for the crimes); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991) (discussing the arguments in favor of prosecuting those people who commit human rights violations); Eileen Rice, Note, Doe v. Unocal Corporation: *Corporate Liability for International Human Rights Violations*, 33 U.S.F. L. REV. 153, 171 (1998) (asserting that by holding liable a corporation whose business partner violated human rights, the *Unocal* court "affirmed the opinions of many Americans who support protection of international human rights").

22. *See* Colloquy, *War Crimes Tribunals: The Record and the Prospects*, 13 AM. U. INT'L L. REV. 1383, 1407 (1998) (asserting that it was not the failure of the Nuremberg Tribunal that the international community did not build a system to protect human rights); Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights Law and its Impact on Japan*, 28 STAN. J. INT'L L. 139, 140 (1991) (pointing out that human rights laws have little effect on behavior because there is little enforcement of human rights); *see also* Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the Ecowas Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 401 (1998) (bemoaning an international system that still has to rely on individual states to enforce international human rights).

international human rights standards.[23] Because there is a lack of precedent for protecting international human rights in the United States, a model case is needed to further strengthen the precedent being developed in the Second Circuit of allowing claims based on heinous crimes committed in other parts of the world.[24] I propose that *Pollack* can serve as a model of how victims of human rights violations can find the justice they deserve.

Section II of this Comment, focuses on the Nazi German concentration camps,[25] where unspeakable crimes against humanity occurred during World War II.[26] Enslavement in concentration camps was one of the steps in the Nazi tyrants' scheme for destroying the European Jews and

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23. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY 286 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992) (proposing that individual nations are responsible for implementing human rights standards when they are signatories to the United Nations Charter).

24. *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (granting jurisdiction to claims based on violations of international law); Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (granting original jurisdiction based on the Alien Tort Statute).

25. The Germans started building concentration camps as part of their plan to exploit slave labor and detain people who they considered opponents of Germany. *See* Adolf Stone, *Slave Labor Camps of the Third Reich*, SOC. EDUC., Oct. 1983, at 396. Dachau was the first concentration camp; it started holding prisoners in 1933. *See id.* at 396-97. The Germans used the camps to terrorize the communities they controlled. *See* LENI YAHIL, THE HOLOCAUST: THE FATE OF THE EUROPEAN JEWRY, 1932-1945 at 133 (1990). In general, the camps' conditions were deplorable. *See id.* at 133-35. In the 1940's some of the camps, including the notorious camp Auschwitz, became extermination centers where large groups of people were killed. *See* Chuck Feree, *Auschwitz Revisited* (visited Feb. 3, 1999) <http://remember.org/educate/auschwitz. html>.

26. *See* CHRISTOPHER SIMPSON, THE SPLENDID BLOND BEAST: MONEY, LAW, AND GENOCIDE IN THE TWENTIETH CENTURY 27-41 (1995) (describing the German industrialists of the World War II era as being instrumental in the Nazi Holocaust). In terms of the present discussion on holocaust claims, one can argue that the history of the term "crimes against humanity" begins post World War I. *See id.* at 27-28. World War I also saw its share of serious atrocities. There was much debate after the war over whether the Treaty of Versailles should require Germany to take responsibility for the atrocities committed during the war. *See id.* at 25-27. This never materialized, however, because certain factions, namely the Americans, wanted to protect Germany from paying reparations. *See id.* at 37-41. These factions wanted to reestablish German industry in order to allow German economy to grow again. *See id.* America's hesitation becomes relevant later in the discussion of World War II because the same American faction, with close ties to the German industrial leadership, allowed German leaders to go unpunished for their role in the Nazi horrors. *See id.* at 27-41.

Unlike in WWI, the victorious Allies of WWII signed a charter that established the International Military Tribunal (IMT) which, to some extent, attempted to make wrongdoers face their crimes. *See Ferencz, supra* note 21, at 211. The three crimes prosecuted were crimes against peace, war crimes, and crimes against humanity. *See id.* "The evidence, based in large part on captured German records, was overwhelming that crimes of the greatest cruelty and horror had been systematically committed pursuant to official policy."

other minorities the Nazi tyrants deemed less superior.[27] Children and the feeble died immediately in Nazi gas chambers, while people who were physically strong had their lives wrung out like wash cloths.[28] Several leading authorities have detailed German industry's extensive involvement in the Nazi extermination process.[29]

An additional discussion in Section II includes the West German government's reparation programs, as well as private dealings between several companies and the representatives of slave laborers. Since the 1950's the West German government has been paying billions of dollars to various Jewish interests, including the state of Israel.[30] Also, in the 1950's and 60's there were tumultuous negotiations between Holocaust slave laborers and their former slave masters; these were characterized by insincere attempts to compensate Holocaust victims.[31] Section II concludes by discussing two lawsuits which are forerunners to the *Pollack* case. The *Pollack* lawsuit fits into a distinct line of legal actions known as holocaust claims.[32] Volumes of historical evidence show that these claims have

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Id. at 212. Some of the crimes prosecuted under the heading crimes against humanity were enslavement and extermination. *See id.*

27. *See* 3 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 917-18 (1985) (discussing the purpose behind the enslavement of the Jews in concentration camps which was to provide a labor pool to work in the war industry while moving towards systematic extermination); SIMPSON, *supra* note 26, at 88 (recounting the plight of Jewish, Russian, Polish, French, and Ukranian people that were enslaved by the German government in concentration camps and forced to work in private industry for war production or agricultural industries during the Holocaust).

28. This describes the pattern followed by the Germans when choosing their forced laborers. However, the Nazis also killed perfectly healthy adults who were able to perform labor. *See* LESS THAN SLAVES, *supra* note 17, at 17-18; SIMPSON, *supra* note 26, at 88-89.

29. *See generally* LESS THAN SLAVES, *supra* note 17 (chronicling the extensive use of slave labor during WWII by German industrialists); SIMPSON, *supra* note 26 (illustrating German industrialists role in the Holocaust).

30. *See German Restitution for National Socialist Crimes* (visited Feb. 13, 1999) <http://www.germany-info.org/facts/restit.htm> (describing the full history of the German restitution programs).

31. *See, e.g.*, LESS THAN SLAVES, *supra* note 17 at 81-88, 117-22 (describing the negotiations with Krupp and Siemens).

32. When CNN reported the *Pollack* case on their website, they organized the case into the "Holocaust Claims" section. *See Nazi-Era Slaves Sue Firms* (visited Aug. 31, 1998)<http //cnnfn.com/hotstories/companies/9808/31/holocaust>. There are other claims like those in *Pollack* which also fall under the holocaust claims category. *See* Meg Fletcher Crain, *Holocaust Claims-No Easy Answers,* AUTOMOTIVE NEWS EUROPE, Sept. 14, 1998, at 1. Another litigation that has been classified under the holocaust claims category is the Swiss Bank claims. These cases were bought by holocaust survivors or their heirs in order to recover funds that were placed in Swiss bank accounts before the start of World War II. *See* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights,* 31 VAND. J. TRANSNAT'L L. 325, 332 (1998). In August of 1998 the parties in the Swiss Bank claims settled out of court for $1.23 billion. *See* David Rohde, *The Lawsuits Pile Up,*

merit.[33] Accordingly, this Comment will not focus on how to prove a slave labor claim in a court room. Instead, in Section III of this Comment, I focus on the legal procedural barriers that the *Pollack* plaintiffs and other similarly situated human rights victims face before they even reach opening statements.

As an introduction to the legal concepts of the *Pollack* case, I discuss two landmark decisions, *Filartiga v. Pena-Irala*[34] and *Kadic v. Karadzic*,[35] handed down by the Court of Appeals for the Second Circuit. The rulings in both these cases, I believe, set the precedent for a successful claim on part of the *Pollack* plaintiffs.

Section III further analyzes whether the *Pollack* court has jurisdiction over the parties. The defendants will likely raise the issue of jurisdiction as a bar to the plaintiffs' claims.[36] The circumstances alleged by the *Pollack* plaintiffs occurred in Europe; as such, the defendants' may argue that U.S. courts cannot exercise jurisdiction over them. They may further argue that the traditional basis for jurisdiction, such as the geographic principle, will not give the court jurisdiction in this case. The plaintiffs, however, are all United States citizens and they have alleged that each of the defendant-companies, by doing business and having offices in the

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Matching the List of Atrocities, N.Y. TIMES, Sept. 13, 1998, at 6. There are also current lawsuits seeking restitution from insurance companies which issued life insurance policies between 1920 and 1945 to persons killed during the Holocaust. There are approximately 29 companies named in the lawsuit. *See Relatives of Holocaust Victims Add 20 Plaintiffs and 10 European Insurers to Their Class Action,* MEALEY'S INS. L. WKLY., July 14, 1997, at 1. Several task forces organized in both New York and California have been organized in order to expedite the insurance claims. *See California and New York Reach Separate Peace on Holocaust,* 12 FED. & ST. INS. W., Apr. 13, 1998, at 15. These types of claims are not limited to the Germans, however, several Japanese companies have also been accused of using slave labor in Japanese courts. *See* Donald Macintyre, *Inside Story: World War II: Imperial Japan Inc. On Trial,* ASIA WEEK, Nov. 15, 1996.

33. *See generally* Ferencz, *supra* note 21 (citing the Nurenberg, Trials, the Hague Convention and "other prevailing customs of civilized nations who rejected Germany's argument that the rules of war had become obsolete"); LESS THAN SALVES, *supra* note 17 (describing graphically the stories of millions of conscripted salve laborers).

34. 630 F.2d 876 (2d Cir. 1980) (granting original jurisdiction based on the Alien Tort Statute, 28 U.S.C. § 1350 (1994)).

35. 70 F.3d 232 (2d Cir. 1995) (granting jurisdiction for violations of international law).

36. *Cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam) (stating that the district court dismissed the suit because of lack of jurisdiction); Fishel v. BASF Group, 175 F.R.D. 525, 527 (S.D. Iowa 1997) (describing a slave labor claim which was challenged on jurisdictional grounds).

United States, have sufficient contacts with the country to bring them within the jurisdiction of its courts.[37]

The last two subsections of Section III address additional legal issues emanating from the *Pollack* case. The incidents making the basis of this lawsuit occurred over fifty years ago. Because of the passage of time, the defendant corporations will likely argue that this lawsuit is untimely and should be barred.[38] I will discuss the issue of statute of limitations, including how the plaintiffs might successfully argue that the statute of limitations should be tolled because of defendants' attempts to prevent such claims. Finally, I address the issue of *forum non conveniens*.[39] This issue will likely be raised because Germany is an alternate forum which provides the defendants greater geographic advantages. Out of fairness for the plaintiffs and in the interest of justice, I suggest that the United States is the correct forum for the *Pollack* suit, as well as other similar types of human rights claims.

II. THE USE OF SLAVE LABOR DURING WORLD WAR II

A. *A Slave Laborers' Account*

> During the third week of September 1943, a Director of the Krupp installation at Fuenfteichen, Germany, arrived at the Birkenau quarantine Lager of Auschwitz to select able-bodied inmates of the KZ [concentration camp] to work at his plant. The prisoners, completely naked, were paraded before him . . . I was one of those chosen and thus became separated from my father . . . I was 16 years old . . . I remember very distinctly how . . . at a motion from the Krupp representative the SS man, standing nearby, hit my father across the face with force that broke his eye-glasses. This is how I left my father and made my acquaintance with the Krupp enterprises for which I was destined to work for 15 terrible months . . . I was always hungry, sleepy, filthy, tired beyond any normal human comparison, and most of the time by any normal human standards, seriously ill . . . Whenever a prisoner sneaked closer [to the oven] to warm his stiff hands, he was chased away and usually beaten by the Krupp people. Beating and torture administered by the Krupp supervisory personnel

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37. *See* Class Action Complaint 3-16, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

38. *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987) (considering the statute of limitations issue in a human rights claim).

39. *See* Boyd, *supra* note 19, at 41(describing human rights cases where *forum non conveniens* has been used to dismiss the cases and proposing that in the interest of justice, our judicial system must stop using the concept in human rights cases).

> was not uncommon. At work we were Krupp's charges . . . Hungry, cold, stiff, from hard labor, lack of sleep and beating, and in constant fear of our masters we were forced to exert all of remaining energies to make guns for our oppressors. We worked until we dropped.[40]

The *Pollack* plaintiffs claim that the Holocaust should be viewed as if it were "one giant robbery."[41] The Nazi SS[42] stole their lives, Swiss Banks stole their money, European insurance companies stole their insurance claims, some companies stole their gold fillings, and the *Pollack* plaintiffs claim the defendants stole their labor.[43]

B. *Germany's Need for Labor in Waging World War II*

The scarcity of labor in the German work force was one of the main obstacles Germany faced in waging World War II.[44] During WWI, Germany also faced the problem of insufficient labor and at that point tried to solve the labor shortage by conscripting large amounts of German women.[45] However, during the planning stages of WWII the Nazis found the use of German women was abhorrent because of Nazi philosophy.[46]

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40. LESS THAN SLAVES, *supra* note 17, at 77-78 (quoting a statement made by Theodore Lehmen, on June 30, 1958 regarding his experiences at a concentration camp).

41. *See Dateline NBC: Just Rewards?* (NBC television broadcast, Nov. 10, 1998) [hereinafter *Dateline NBC*] (reporting that Ed Fagan, attorney for the *Pollack* plaintiffs, "wants to retrieve what was stolen and return it to survivors").

42. In German pronounced "Schutzstaffel," the SS served as the bodyguards for the Nazi party in its beginning stages and was organized by Hitler's cohort, Heinrich Himmler. *See* 1 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 200 (1985). Subsequently, the SS became involved in all aspects of the party's business. *See id.* When the Nazis came to power in Germany they merged with the police. *See id.* During the Holocaust it organized the killing operations of Jews and others. *See id.* at 56,62.

43. *See Dateline NBC, supra* note 41 (reporting that only "a handful of slaves" ever received retribution from their former slave masters).

44. The other two obstacles the Germans faced were the lack of raw materials and foreign exchange. *See* Ulrich Herbert, *Forced Labour, in* THE OXFORD COMPANION TO WORLD WAR II 379, 380 (I.C.B Dear & M.R.D. Foot eds., 1995) (discussing a Nazi defense report which listed the three main areas where Nazi expenditures were most needed).

45. *See* WILLIAM MANCHESTER, THE ARMS OF KRUPP: 1587-1968, at 485 (1968) (examining Germany's shortage of manpower during WWII).

46. *See* Herbert, *supra* note 44, at 381 (explaining the conflict in the Nazi party regarding the lack of labor to support a world war). The Nazis thought that women belonged in the home and greatly mistrusted women having a role in industry. *See* MANCHESTER, *supra* note 45, at 485. This contrasts with the United States where over three million women were recruited to work in the factories and with England where over two million were recruited. *See id.* Nazis believed that the German people were the superior race and that everyone was less. *See generally* Richard Overy, *Nazi Ideology, in* THE OXFORD COMPANION TO WORLD WAR II 779, 779-80 (I.C.B Dear & M.R.D. Foot eds., 1995) (describing the development and characteristics of Nazi ideology).

The alternative, equally unappealing to Nazi philosophy, would be conscripting foreigners into the labor force.[47]

Although initially they had not planned to exploit foreign labor, when WWII began, the Germans started exploiting labor from the countries they were conquering.[48] In addition to the foreign civilians and prisoners of war, the Germans began exploiting concentration camp labor around 1942.[49]

Interestingly, the Nazis' use of Jews as forced laborers is ironic because, as a result of the extermination plan, the Nazis themselves created a sizable gap in their labor force.[50] Germans felt that the Jews and others could make a valuable contribution to the Fatherland before they were exterminated.[51] The Nazis had over seven million foreign civilians and prisoners of war, mainly from Poland and Russia, in labor camps by the end of World War II.[52]

An elaborate system of ordering slave labor from concentration camps developed between German companies and the Nazi government.[53] The head of the slave labor ordering system was Albert Speer.[54] Hitler ap-

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47. *See* Herbert, *supra* note 44, at 381 (writing that the Nazis thought that it would be a threat to their purity as a people if they had to rely on foreign labor).

48. *See* MANCHESTER, *supra* note 45, at 485 (stating that without foreigners the Nazis would have had no other alternatives).

49. *See* Herbert, *supra* note 44, at 384 (explaining that Speer's new concentration camp system consisted of sending concentration camp labor out to businesses in groups of 500).

50. *See* 3 HILBERG, *supra* note 27, at 917 (noting that Nazis at the concentration camps were poor caretakers of the manpower in their custody). The administrators who determined whether people would either die in gas chambers or to go to work, did so in an extremely careless manner. *See id.* at 918. There are documented instances where doctors knew that strong men and women were arriving on a certain train load, but would not properly sort the Jews, leaving potential laborers to die in the gas chambers. *See id.* In 1942, the Nazis actually reconsidered the extermination of the Jews in light of a need for manpower and armaments. *See* LESS THAN SLAVES, *supra* note 17, at 17-18. At this point Albert Speer was appointed by Hitler to determine what percentage of Jews could be "liquidated." *See id.* Shortly after Speer was appointed to head the slave labor program, Birkenau, the killing center at Auschwitz, was expanded. *See id.*

51. *See* MANCHESTER, *supra* note 45, at 489 (describing a discussion between Hitler and the SS).

52. *See* Herbert, *supra* note 44, at 379 (reporting that the Nazis' practice of forced labor was the most important incidence in history of large-scale use of slave labor since the end of American slavery in the 19th century).

53. *See* 3 HILBERG, *supra* note 27, at 933-34 (describing a system wherein a company would make its request in triplicate forms and submit it to the Speer ministry for a determination of whether the allocation of labor was justified).

54. *See id.* at 934. *See also* Carolyn L. Speaker, *What Lessons Can Be Learned From the Personal History of Albert Speer? To My Mind, An Analysis of His Personality Allows Us to Derive Some Very Important General Rules. One Lesson Is "Know Thyself,"* 30

pointed Speer to be armaments minister in 1942; Fritz Sauckel would be Speer's underling.[55] Speer's job required him to place laborers where they were needed most.[56] The German Army sustained an enormous loss to their vehicles and other military equipment during the winter campaign of 1942 against the Russians.[57] In response to the losses in March of 1942, Speer ordered Sauckel to put all Germans into the labor force; if that population left the labor pool inadequate, then Sauckel was to force foreign laborers into the German labor pool.[58] During their testimony at Nuremberg both men admitted that there was a discussion with Hitler about whether forcing laborers into the labor pool was a violation of International Law.[59]

Foreigners, however, were not Speer's only victims. The Speer bureaucracy and German companies jointly established an intricate plan to exploit concentration camp labor.[60] A company would inform Speer of the gap in their workforce and Speer would then order Sauckel to provide the people to fill the need.[61] These two men survived the war and were tried in Nuremberg.[62] Speer was freed from prison in 1966 and Sauckel was hanged in 1946.[63]

CASE W. RES. J. INT'L L. 601, 601-05 (1998) (reviewing HENRY T. KING, THE TWO WORLDS OF ALBERT SPEER: REFLECTIONS OF A NUREMBERG PROSECUTOR (1997)).

55. *See* JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 162 (1994) (examining the prosecution of Speer and Sauckel at Nuremberg).

56. *See id.*

57. *See id.* (discussing the appointment of Speer and Sauckel).

58. *See id.* at 162-63 (detailing the process followed by Speer and Sauckel in setting up the supply of laborers).

59. *See id.* (noting a conversation between Speer, Sauckel, and Hitler regarding whether conscription of foreigners was a violation of international law).

60. *See id.* at 163-64 (explaining that German manufacturers would provide Speer with requests for manpower to satisfy their labor needs); 3 HILBERG, *supra* note 27, at 933-34 (illustrating how Speer did not have enough concentration camp laborers to meet the companies' orders); SIMPSON, *supra* note 26, at 85 (describing how companies would obtain laborers only if they made a request and delineated exactly how they were going to house and guard their prisoners).

61. *See* 3 HILBERG, *supra* note 27, at 934 (describing the system that developed between industry and the Speer office for requesting laborers); PERSICO, *supra* note 55, at 162-63 (describing how Speer and Hitler designated Sauckel as the bureaucrat in charge of "bringing in workers").

62. *See* PERSICO, *supra* note 55, at 404 (describing the scene at Nuremberg when Speer and Sauckel received their sentences).

63. *See id.* at 404, 451 (explaining that Speer was sentenced to twenty years in prison and Sauckel was given the death penalty).

C. *Historical Developments that Led to the Exploitation of Concentration Camp Labor*

European Jews have been mistreated by non-Jews since the reign of Constantine in the fourth century.[64] However, the Nazi government's extermination of the Jews during WWII was unprecedented; never before had a European government tried to unilaterally destroy Judaism.[65] Nevertheless, the process of destroying German Jewry would be a daunting task because it entailed removing Jews from every facet of German society.[66]

1. Rise of the Nazi Party

After World War I,[67] the German people brought the National Socialist German Workers Party (The Nazi Party) to power.[68] Although the party did not form legal and political segments until 1930, immediately upon the party's organization, Jews became the subject of mistreatment and, in some cases, murder.[69]

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64. *See* 1 HILBERG, *supra* note 42, at 5 (explaining that persecution of Jews started centuries before the rise of the Nazi Party).

65. *See id.* at 9 (describing the apparatus necessary for the Germans to implement their plans to exterminate the Jews).

66. *See id.* at 55 (analyzing the destruction of the Jews not merely as a product of German "laws or commands," but as a fusion of all parts of German society working together as a team to meet the goal of removing Jews from Europe).

67. During WWI the Turkish government instigated the genocide of a million Armenians, a minority group within the Ottoman Empire. *See* SIMPSON, *supra* note 26, at 28. The Armenians were worked to death building a railway line for German business interests in Turkey. *See id.* The victorious nations of WWI agreed that the Armenian genocide should be addressed. *See id.* at 31. Most of the victors also had strong feelings that Germany should pay reparations. *See id.* at 16-17. Neither of these goals, however, were fully administered to completion. *See id.* at 37, 45. The victorious western governments did not prosecute the criminals who had perpetrated the Armenian genocide because they did not want to forego their position in vying for Middle East oil. *See id.* at 40-41, 45. Also, there was serious opposition in certain western circles to giving effect to the term "crimes against humanity." *See id.* at 27. Americans in the State Department after WWI, like Robert Lansing and John Foster Dulles, contributed to this opposition by creating an international law framework that made it hard to address Nazi crimes. *See id.* at 97-98. Bolstered by principles of non-intervention and state sovereignty, these men believed that the Nazi government could do as it pleased to its civilians. *See id.*

68. *See* 1 HILBERG, *supra* note 42, at 31-32 (explaining the roots of anti-Jewish law in the Nazi party). The Nazi party did not have to develop a new mind set among the German people in order to ostracize the Jews because the foundation of anti-Jewish laws had already been established for centuries. *See id.* at 31.

69. *See id.* at 34 (explaining that starting in 1931 there were brown shirt demonstrations in front of synagogues where Jews were accosted).

Adolf Hitler, the leader of the Nazi party, became chancellor of the German Reich in January of 1933.[70] By March and April of the same year, anti-Jewish legislation had been passed.[71] On August 20, 1935, the Nazi Party held a convention where it decided that it could not be unorganized in its actions against Jews; its Jewish "problem" had to be solved in an organized and legal manner.[72] Even though certain groups of the Nazi party wanted to disenfranchise Jews in a legal manner, others in the party proposed physical violence toward Jews.[73]

2. Disenfranchisement of the Jews From German Society

As the Nazi party alone could not perpetrate the Holocaust, every segment of German society became involved in the process that led to the Holocaust.[74] The civil services were responsible for writing the laws and regulations, starting the process of concentrating Jews into city centers, and later arranging for the transport of Jews to death camps.[75] Without the railroad companies and police department, which later became the German SS, the transport to death camps would not have been possible.[76] While Germany was at war, the army became involved in the destruction process.[77] Industry also became involved because it needed the labor of

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70. *See* SIMPSON, *supra* note 26, at 59 (indicating Adolf Hitler initiated and carried out the Holocaust).

71. *See id.* (noting that in less than three months Hitler's government generated decrees restricting Jews from work as doctors, dentists, lawyers, teachers, and civil servants); *see also* 1 HILBERG, *supra* note 42, at 33 (describing the Third Reich's first anti-Jewish legislation).

72. *See* 1 HILBERG, *supra* note 42, at 36-37 (illustrating how unorganized actions against the Jews adversely affected the German business world).

73. *See id.* at 38-39 (recognizing that after the decrees, certain sections of the Nazi SS became restless, and initiated a riot). Members of the Nazi SS rioted because they wanted to play a role in the actual implementation of the anti-Jewish destruction process. *See id.* at 38.

74. *See* SIMPSON, *supra* note 26, at 4-5 (describing how all segments of German society were given "specialized tasks necessary for mass murder").

75. *See* 1 HILBERG, *supra* note 42, at 56 (explaining the German hierarchy of government and community that developed over the centuries to become a machine that destroyed the Jewish society).

76. *See id.* at 62.

77. *See id.* (noting that because the Army had control of certain areas they were delegated extermination tasks).

the Jews.[78] Eventually, it was industry which masterminded the methods for gassing the Holocaust's victims.[79]

Throughout the 1930's the Nazi government dispossessed Jews of their property and forced a large portion of the Jewish population to emigrate from Germany in a systematic attempt to take away Jewish wealth.[80] The Germans began limiting Jewish employment as part of their economic measures against the Jews.[81] One of the first programs the Nazis enforced was the forced retirement of Jews from civil service.[82] Also, part of the Nazi plan was to decrease Jewish presence within German commerce.[83]

The Nazi government had to rely on industry to a large degree to remove Jews from large and small businesses.[84] Large German owned firms, including some of the *Pollack* defendants, had Jewish employees.[85] In some cases, these German owned businesses either forced their Jewish employees to leave by retirement or the companies moved their Jewish

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78. *See id.*; SIMPSON, *supra* note 26, at 5 ("By 1944 and 1945, leaders of major German companies such as automaker Daimler Benz, electrical manufacturers AEG and Siemens, and most of Germany's large mining, steelmaking, chemical, construction companies found themselves deeply compromised by their exploitation of concentration camp labor, theft, and in some cases complicity in mass murder.") (footnotes omitted).

79. *See* JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN 122-23 (1978) (describing how I.G. Farben conspired with the commanders of the concentration camps to develop Zyklon B, the gas used in the death camps' gas chambers).

80. *See* 1 HILBERG, *supra* note 42, at 83 (indicating that Germans took away Jewish property in order to impoverish them).

81. *See* 1 HILBERG, *supra* note 42, at 83-93 (discussing the legal and societal process of expropriation); SIMPSON, *supra* note 26, at 57 (describing the role of German business elite during the Holocaust).

82. *See* 1 HILBERG, *supra* note 42, at 87-88 (giving an account of how Hitler snuffed out a protest of his termination of civil servants who had served during WWI).

83. *See id.* at 94-95 (listing the many diverse areas of Germany's economy in which the Jews had interests). In 1934, there were 21 large Jewish holdings that were taken over by German companies. *See* SIMPSON, *supra* note 26, at 62. Two of these forced take-overs were by Siemens. *See id.* Many growing corporations, built mainly from the take-over of Jewish-owned businesses, sold bonds on the world market to raise capital and to perpetuate the Aryanization of still more companies. *Id.* at 63-64. A large majority of the German companies, including Krupp, participated in aryanization of Jewish businesses. *See id.* at 66-67 (citing a study by Guenter Keiser in 1939).

84. *See* SIMPSON, *supra* note 26, at 59 (stating that "[t]he Nazi party and the SS, not the industrial and financial elite, initiated the Holocaust. But they succeeded in their program of genocide only by enlisting [these groups].").

85. *See* 1 HILBERG, *supra* note 42, at 91-94 (describing the complicated and extensive task of removing Jews from German industry). An example of how dismissals worked is illustrated by the way Abs Bank took over Creditanstalt when the Germans took over Austria and soon thereafter kicked out its Jewish employees. *See* SIMPSON, *supra* note 26, at 72.

employees to foreign divisions.[86] Nazis ensured businesses' participation in the process by providing financial incentives which allowed companies to keep their ranks in German industry and their places in German society.[87]

Aryanization was a method the Nazis used to remove Jews from German industry by selling Jewish businesses.[88] Until 1938, Jews could voluntarily sell their businesses.[89] After that time, however, the Nazis took away that option and Jews were then forced to sell.[90] In order to effectuate that goal, Jewish owned businesses were marked with white paint on the glass of their store-fronts with the word "Jude," German for Jew, so that the German populace could easily identify them and boycott them.[91] Finally, the government revoked the licenses of all Jewish professionals, including doctors and lawyers, leaving many with no livelihood.[92] As the expropriation process progressed, Jews were forced to concentrate into city centers because they had to rely on each other for survival.[93] When the Jews were amassed in the large cities, the Nazis started separating the

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86. *See* 1 HILBERG, *supra* note 42, at 93. At times there was a great reluctance to relieve Jewish employees because some businesses lost the efficiency of long time employees. *See id.* After 1938, the expulsions became more commonplace and devastating to Jewish lives. *See id.* at 93-94.

87. *See* SIMPSON, *supra* note 26, at 5 ("Aryanization laws created a profitable business for banks, corporations, and merchants willing to enforce Nazi racial preferences."). There is a tendency to think that the corporations participated in the genocide only when it was in their best interest. *See id.* at 59-60. However, towards the end of the War the German government and industry continued to participate in the Genocide of the European Jews even though it was becoming financially inconvenient. *See id.* There is reason to believe that without aryanization the Nazi party would not have stayed in power in the 1930's. *See id.* at 68 (citing an economic argument presented by historian Arthur Schweitzer). There was little division within the Nazi party because society as a whole prospered from stealing Jewish property. *See id.* One area of the German government that especially benefited from Jewish property was the Army, since much of the German military build-up was funded by stolen Jewish property. *See id.* (citing Herman Göring, the senior war mobilization official, who stated that the two primary sources of funds for the German military during WWII was Jewish property and the looting of the Austrian treasury).

88. *See id.* at 60 (defining Aryanization as forcing "the sale of Jewish-owned property at a fraction of its value to ethnic German entrepreneurs").

89. *See id.* (stating that although the sale of the businesses were legally defined as "voluntary," they were in fact forced to sell their property).

90. *See id.* (noting that after the initial "voluntary" phase, Jews were forced to sell their property, irrespective of the market cost, for whatever the Germans would offer).

91. *See* 1 HILBERG, *supra* note 42, at 98 (describing how the German people knew specifically which establishments were Jewish owned).

92. *See id.* at 125 (describing how "the Ministerial bureaucracy wiped out, in six consecutive blows, the remaining structure of Jewish business and self-employed activity").

93. *See id.* at 158 (explaining the concentration of Jews into city centers).

Jewish population from regular German society.[94] The process of concentration was aided by several Nazi measures. Mingling among Jews and non-Jews was highly restricted, as was travel.[95] Eventually, those Jews who lived outside of city centers were forced to sell their homes and move into the Ghettos.[96] Because the Jewish people started congregating together in the centers of big cities, the Germans later found it easy to move them to the concentration camps in the East.[97]

Poland had the largest Jewish population in Europe at the beginning of World War II.[98] To a large degree, the Jews in Poland were already concentrated in the city centers when the Germans invaded Poland in 1939; this made it easier for the Germans to close the Jews off from the rest of the world in walled ghettos.[99] Because the Germans could easily control the large congregation of Jews in Poland, the devastation of Jews there was extensive. Out of the 33 million people in Poland at the beginning of the War over 3 million were Jewish.[100] There were 400,000 Jews in Warsaw and approximately 400,000 Jews in the entire country of Germany at that time.[101] Beginning in 1939, Nazis started forcing both Jews and Gypsies to leave Germany for Poland.[102]

D. *Slave Labor System and the Pollack Defendant's Use of Conscripted Labor*

March 4, 1939 marked the beginning of forced labor for the Jews.[103] On this date, the Economy Minister pronounced that all Jews who were unemployed would join labor projects.[104] At this beginning point of the Holocaust, nearly all Jews were unemployed because there were no more

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94. *See id.* at 158-59 (describing how the Nazi establishment, believing that the ordinary German people were too friendly with the Jews, began making decrees to start separating the Jews from the regular community).

95. *See id.* at 158-67 (describing various German policies directed at the Jews).

96. *See id.* at 171 (illustrating the housing restrictions placed on Jewish families).

97. *See* 1 HILBERG, *supra* note 42, at 187 (observing that the Jewish population in Germany between 1939 and 1940 was quickly dwindling away; the death rate was extremely high and the birth rate was almost nonexistent).

98. *See id.* at 189.

99. *See id.*

100. *See id.*

101. *See id.* (providing an analysis of Germany's population during the thirties).

102. *See id.* at 205-34 (describing the process of forcing Jews into the Ghettos of Poland; an example would be the Warsaw and Krakow ghettos where forced population growth was achieved easily by utilizing the train systems).

103. *See* 1 HILBERG, *supra* note 42, at 145 (explaining the process of how the Jews became susceptible to conscription into hard labor).

104. *See id.* (describing the March 4, 1939 agreement between the President of the Reich Labor Exchange and the Economy Ministry).

Jewish professionals, businesses, or jobs for Jews in the government.[105] By 1939, the German government had successfully forced all Jewish influence out of the German economy.

Despite the Jews' poor state of affairs, they maintained hope that if they kept to themselves and worked hard in forced labor they would live through Nazi rule.[106] In 1941, tens of thousands of Jews joined forced labor projects just to get food.[107] Some Jews were forced to labor in German factories.[108] New laws were enacted to allow industry to exploit Jews at their will; Jews could not decline to work if a German insisted.[109] Jews had become a commodity.[110]

When the Germans invaded Poland, they immediately put the Jews to work.[111] They saw the potential man power the Jews provided.[112] Initially, the organization of labor was done on a limited scale; invading Germans were restricted to composing simple manual labor projects performed mainly outdoors.[113] Although the Germans paid these workers very little,[114] laborers were allowed to return home when their day was finished.[115]

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105. *See id.* at 144-45 (detailing the effects of Arianization and describing the Jews' loss of livelihood).

106. *See id.* at 146 (indicating that Jews were receiving less of the necessities of life than ever before).

107. *See id.* 144-47 (recounting that labor projects, established by the Labor minister, were intended to utilize Jewish man power, and segregate Jews from non-Jewish labor within private employment).

108. *See id.* at 146-47 (explaining that although Jews initially were paid for their labor, the Labor Ministry set low wages for Jewish work and held that because "Jew labor was only a commodity" Jews need not be paid for "holidays, family and children's allowances, birth or marriage subsidies, death benefits, bonuses, anniversary gifts, compensatory payments," or travel allowances).

109. *See* 1 HILBERG, *supra* note 42, at 147-48 (stressing that "industry had been given the right of almost unlimited exploitation: to pay minimum wages for maximum work"). After the Jews had been paid, most of their earnings were taxed away to the German government. *See id.* at 148-49.

110. *See id.* at 146 (explaining how Jewish labor was considered a commodity).

111. *See id.* at 249 (explaining that because the Polish Jews were poor, the Germans found their labor more important than looting their property).

112. *See id.* (commenting that there "was no need for a forced labor system during this period, but, to the Germans, the sight of thousands of Jews 'milling around' (herumlungernde Juden) was a challenge that had to be met right away").

113. *See id.* at 253 (explaining that at first the forced labor consisted of tasks performed for the military, but later the industrial complex started using forced labor).

114. *See id.* at 251-52 (commenting that, if made, payments to Jews for their labor were sporadic).

115. *See* 1 HILBERG, *supra* note 42, at 250 (describing that the "forced labor troops" were organized by picking Jews in the streets, organizing them into columns and marching them to labor site; "[a]t the end of the working day the Jews were released, and next day the same procedure was started anew").

Soon thereafter, the Nazi bureaucracy saw the need for a stricter organization of workers in order to conduct specialized projects.[116] In February of 1940, slave laborers from the first concentration camps in Poland started building an enormous anti-tank ditch stretching along the Polish/Russian border.[117] By 1941, there were 45 camps in which over 25,000 people were toiling in heavy labor.[118] It took very little resources to get the camps running.[119] Because of a limited allocation of resources, living and working conditions in the camps were despicable.[120]

Private companies were slow in utilizing the labor from the camps.[121] However, by 1942 private German companies started their exploitation of concentration camp labor in earnest.[122] A large majority of German companies were apathetic about the innocent people they were exploiting and in many cases, killing.[123] Their active role in Aryanization of Jewish property and businesses in the 1930's is evidence of this fact, as well as their willing participation in the genocide.[124] Essentially, the exploitation of the Jews was good business until the waning part of the War.[125]

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116. *See id.* at 252 (explaining the reasons for constructing the labor camps).

117. *See id.*

118. *See id.* at 253. By the end of the war there were 23 main concentration camps that acted as centers for the distribution of slave laborers. *See* SIMPSON, *supra* note 26, at 90-91. There were an additional 1,000 feeder camps that were created by either German companies or the SS. *See id.* Krupp constructed 55 camps in the Essen area alone. *See id.* Krupp employed its own guards at its camps and they made some laborers sleep in construction materials. *See id.*

119. *See id.* at 254 (detailing the simplicity of the financial aspects of the camps).

120. *See id.* (articulating the deplorable conditions of the camps and the horrors endured by Jews in the camps).

121. *See* 1 HILBERG, *supra* note 42, at 254-55 (arguing that "private firms did not enter into labor camps until 1942"); SIMPSON, *supra* note 26, at 85 (explaining that the Nazis started to provide labor from the camps to the industrialists in 1942).

122. *See* 1 HILBERG, *supra* note 42, at 256 (recounting the industrialization of the Warsaw ghetto).

123. *See* SIMPSON, *supra* note 26, at 68. When the extermination of Jews by gassing started in earnest around 1942, it became clear to Western spy organizations that most of the corporate executives knew about the exterminations. *See id.* at 81 (explaining how Germany's industrialists not only knew about the Jewish genocide, but that they willingly participated because it was good business). There is evidence that German industrialists were made aware of the Jewish genocide by a select few corporate executives who were disenchanted with the Nazi party and started feeding this information to West. *See id.* The depiction of a visit to the Aushwitz camp by an executive of IG Farben serves as evidence that the Holocaust was not a secret: "*no one* could have approached the IG Farben works without becoming horribly, fearfully aware of what was happening nearby" because the stench of burning flesh stuck in the air. *Id.* at 83.

124. *See id.* at 68 (discussing German reliance on organizations for the stability of their economic and political structure).

125. *See id.* (stating that German big business, shopkeepers and professionals prospered by using Jews).

The forced labor programs were merely a link in the chain of the extermination process.[126] Concentration camp managers would order a laborer killed when he or she could work no longer.[127] In 1943, so many different companies were involved in the genocide that victims were scarce.[128] The boards of directors for Krupp, Siemens, Volkswagen, and other companies started to meet with the SS in order to personally ask for slave laborers.[129] Among the industrialists who met with the SS were Volkswagen's Ferdinand Porche and Siemen's Rudolf Bingel.[130]

The SS was one of the main exploiters of slave labor and it demanded literally the lives of their laborers.[131] When companies moved into camps like Auschwitz, camp managers adopted the SS manner of treating their laborers.[132] The life expectancy of inmates in the hands of a private company was 3-4 months.[133]

German based company, I.G. Farben, along with the Nazi government, organized and built Auschwitz[134] and was the first German company to build factories in or around the concentration camp.[135] Farben became

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126. *See id.* at 88 (explaining the system that the SS created to exploit Jews and others while they killed them).

127. *See* 3 HILBERG, *supra* note 27, at 917 (recounting that captive laborers were kept alive for construction or industrial projects, but later killed).

128. *See id.* at 934-35 (illustrating that the death of so many Jewish men created a shortage in laborers which forced the use of women, children, and the elderly).

129. *See* SIMPSON, *supra* note 26, at 85-86 (describing the personal account of these meetings by Oswald Pohl, who was the SS officer in charge of their slave labor program).

130. *See id.* at 85-86 (stating that members of the board of directors at IG Farben, Siemens, Krupp and Volkswagen sought large numbers of forced laborers).

131. *See* 3 HILBERG, *supra* note 27, at 922 (explaining the harsh working conditions under which the SS made their laborers work). The SS's forced laborers were made to work at a constant fast pace. *See id.* For example, sick, starved, and feeble workers had to unload vegetables at a run. *See id.* At Krupp, guards used steel whips on the workers. *See* PERSICO, *supra* note 55, at 355 (recounting Speer's questioning at Nuremberg as to his visit to Krupp).

132. *See id.* at 930 (recounting that at an I.G. Farben camp they welcomed their new slave laborers by telling them that "[t]hey had come not in order to live there but to 'perish in concrete.'"). Laborers were forced to trot while carrying the concrete after they had dug it up and if they could not work anymore they would be buried by concrete in the holes that they had just dug, as were the ancient children of Israel. *See id.*

133. *See id.* at 931 (referring to the life expectancy of inmates at I.G. Aushwitz).

134. *See* Chuck Ferree, *supra* note 25 (describing the deaths at Auschwitz). To Jews, Aushwitz is the most notorious of all the Nazi concentration camps because it is where approximately three million Jews were killed; therefore, at least 1/3 of all Jews who died in the Holocaust died within the walls of Auschwitz. *See id.* My maternal grandfather was from Krakow, Poland. He was one of the few members of his family to escape from the Germans. Because Aushwitz was the death camp where Nazis sent Krakow Jews, to me, Aushwitz represents the place where nearly 100 members of my family were killed.

135. *See* SIMPSON, *supra* note 26, at 84-85 (explaining the German companies' gradual involvement in Aushwitz).

the expert on how to use concentration camp labor and became a consultant to such companies as Volkswagen, Messerschmitt, Heinkel, and other German companies.[136] The German government further expanded the camps in order to allow other companies to exploit their slaves' labor.[137] In 1943, there were approximately 40,000 people being exploited by the private German industry at Auschwitz.[138] With few exceptions, every vital segment of Germany's economy was reliant on forced laborers by the midpoint of WWII.[139]

Krupp, a metal works company which manufactured many of the weapons the German Army used during WWII,[140] built approximately one hundred camps across Germany, Poland, Austria, France, and Czechoslovakia wherein it conscripted forced labor.[141] Although Krupp produced armaments, it also ordered its concentration camp laborers to build things like railroad junctions, sheds, and washrooms.[142] Yet, it never provided its laborers with adequate rations, clothing, or shelter.[143] "Krupp considered it a duty to make 520 Jewish girls, some of them little more than children, work under the most brutal conditions in the heart of the concern, in Essen."[144] The slaves were frequently beaten and kept in horrendous living conditions.[145]

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136. *See id.* at 84 (exploring how Farben became known as the company which perfected the technique of integrating concentration camp labor).

137. *See id.* at 85 (discussing a writing of Albert Speer which described the expansion of concentration camps in order to allow more laborers to be exploited by industry).

138. *See* 3 HILBERG, *supra* note 27, at 933 (averaging the number of workers at Aushwitz at any given time during WWII).

139. *See* SIMPSON, *supra* note 26, at 86 (emphasizing that "the initiative for these programs came from industry, not from the Nazi state"). Close to 20% of Germany's workforce was made-up of forced laborers. *See id.* Some segments of industry relied on these laborers to the extent of 60% of their workforce. *See id.* Anywhere from 5.3 to 8.1 million foreign laborers and prisoners of war were forced into slavery by Sauckel. *See id.* at 86-87 (showing the labor figures of Sauckel's labor campaign). Another five million Jews and Poles were forced into Germany's forced labor system. *See id.* at 87. Therefore, a figure of 10 million forced laborers in Germany during WWII is a conservative estimate.

140. *See Ideas Make History, Increasing State Intervention* (visited Feb. 4, 1999)<http://www.krupp.com/eng/hist/hist10.htm> (explaining the expansion of their production to armaments).

141. *See* MANCHESTER, *supra* note 45, at 492 (using estimates from Nuremberg's records that survived the War).

142. *See id.* at 491 (describing how Rudolf Höss, the SS commander of Auschwitz, assigned laborers to Krupp).

143. *See id.* (explaining that adequate food, clothing, and shelter were lacking).

144. *Id.* at 10.

145. *See id.* at 493 (recounting the experiences of two technicians that worked for Krupp, who intervened when the guards made an inmate hop to get around the factory).

Of the sixteen plaintiffs in the *Pollack* lawsuit, two claim that they were slaves for Krupp or one of its predecessor companies.[146] Richard Friedemann, one of these plaintiffs, claims that Krupp forced him to work with metal in horrendous heat that burned his flesh constantly while he worked and was further burned by the asbestos clothing he was forced to wear.[147] His complaint alleges he was beaten, sexually humiliated, and was under the constant threat of being killed.[148]

Siemens, another defendant,[149] served as a major electrical power supplier during the war[150] and currently remains a large electrical conglomerate in Germany and throughout the world.[151] Siemens exploited slave labor throughout the war[152] in such camps as Auschwitz, Ravensbruck, Dachau, and Mauthausen.[153] There are a number of documented occasions where Siemens requested slave laborers from the SS.[154] In 1943 and 1944, Rudolf Höss, the head of the Aushwitz camp, testified at Nuremberg that Siemens received 2,700 women, who made electrical switches for aircraft.[155] Siemens' use of slave labor was quite extensive, however, and reached into several different Nazi camps.[156]

Helene Pollack, is one of four plaintiffs in the suit making claims against Siemens.[157] She alleges that Siemens enslaved her at a labor camp near Nuremberg, where she and her sisters were forced to make

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146. *See* Class Action Complaint 3-12, Pollack v. Siemens AG, NO. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (stating that plaintiffs Richard Friedmann and Herman Sheppard were slaves for Krupp AG, Hoeseh-Krupp and its predecessors).

147. *See id.* at 4.

148. *See id.*

149. *See id.* at 13.

150. *See* LESS THAN SLAVES, *supra* note 17, at 106 (stating Siemens provided electricity to the concentration camps).

151. *See Products & Solutions, Business Segments* (visited Feb. 4, 1999)<http://www.siemens.de/en/products_n_solutions/index.html> (listing the range of Siemen's products).

152. *See* LESS THAN SLAVES, *supra* note 17, at 117 (quoting the *History of the House of Siemens*).

153. *See id.* at XIX. Siemens was also involved with camps located in Flossberg, Sachsenhausen, Buchenwald, and Gross Rosen. *See id.* at 118

154. *See id.* at 118-19 (describing the recorded use of slave laborers by Siemens).

155. *See id.* at 118.

156. *See id.* at 118-19 (reporting that Siemens employed slave laborers at several different sites and therefore utilized the services of various camps).

157. *See* Class Action Complaint 3-5, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (identifying the plaintiffs as having been forced to work in factories owned by Siemens AG).

bombs and munitions.[158] They regularly went without food, were often beaten, and were made to wear wooden shoes without stockings even though the camp was often freezing.[159]

Volkswagen, the well known automobile manufacturer, started making automobiles in 1934.[160] They used slave labor from the Neuegamme, Wolfsburg, and Fallerslben concentration camps.[161] Plaintiff, Bernard Roth alleges he was a slave laborer on a Volkswagen assembly line.[162] Mr. Roth claims he received little food, was forced to work in a factory where the lack of ventilation made the factory brutally hot and where he was harassed constantly.[163]

Defendant Heinkel, an aircraft manufacturer during WWII,[164] used laborers from Auschwitz, Buchenwald, Mauthausen, Naatzwiller-Struthof, Ravensbruck, and Sachsenhausen.[165] Plaintiff Jack Sittsarner alleges that Heinkel and its predecessors conscripted him as a forced laborer for over two and one-half years.[166] He was given nothing to eat during the day and was under the constant fear that he would be killed if he made a mistake while constructing aircraft.[167]

BMW, now an automobile manufacturer, made airplane engines and automobiles at the time of the war.[168] The company used concentration camp laborers from Buchenwald, Dachau, Naatzweiller-Struthof, and

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158. *See id.* at 3 (summarizing the turmoil that Ms. Pollack and her sisters faced in the factories).

159. *See id.*

160. *See VW World, VW History* (visited Oct. 2, 1998) <http://www3.vw.com/vwworld/thirty01.htm> (tracing the history of Volkswagen and the production of what Germans called "the peoples' car").

161. *See Companies Affiliated With Concentration Camps* (visited Feb. 5, 1999)<http://www.remember.org/educate/companies.html> (listing the different companies' involvement in the use of concentration camp labor).

162. *See* Class Action Complaint 9, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

163. *See id.*

164. *See Luftwaffe Index* (visited Feb. 5, 1999) <http://www.qt.org/worldwar/luffwaffe/luft3.html> (listing the aircraft of the Luftwaffe, the German Air Force). Heinkel made the He 162, which was a fighter, and the He 111 and 177, which were bombers. *See id.*

165. *See* SIMPSON, *supra* note 26, at 290-308 (tabulating "German companies and main SS concentration camps reported to be active in exploitation of forced labor during the Third Reich").

166. *See* Class Action Complaint 6, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

167. *See id.* at 6.

168. *See Enterprise, 80 Years of BMW* (visited Feb. 5, 1999) <http://www.bmw.com/bmwe/enterprise/heritage/history/history_3.shtml> (providing a history of BMW and listing the different products made by BMW).

Sachsenhausen.[169] Plaintiff Tibor Eisen alleges that BMW enslaved him for a year and forced him to lug heavy bags filled with cement and iron.[170]

Daimler-Benz made automobiles during the War, but started producing war materials in 1942.[171] The company conscripted laborers from Naatzweiler camp, which was housed underground, and the Sachsenhausen[172] and Schirmeck concentration camps.[173] The *Pollack* plaintiffs allege Daimler-Benz is the successor in interest to the companies Telefunken, who used laborers from Gross-Rosen; AEG, who used laborers from Stutthof and Riga-Kaiserwald; and Messerschmitt, who used laborers from Dachau, Flossenburg, and Mathausen.[174] Specifically, plaintiff Morris Newman alleges that Daimler-Benz forced him to work in freezing conditions with no warm clothes.[175] Often, he was beaten and had to carry heavy objects.[176] He further alleges that he was only fed bread and a concoction resembling soup.[177]

"German industry destroyed at least three million foreign workers between 1942 and 1944 alone."[178]

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169. *See* SIMPSON, *supra* note 26, at 290-308 (listing all concentration camps operated by the SS which held slave laborers).

170. *See* Class Action Complaint 7, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

171. *See Destruction: The Year 1942, History* (visited Feb. 5, 1999) <www1.daimlerchrysler.com/history/epoche6/history1942_d_e.htm> (describing the relevant history of the company). Daimler Benz acknowledges their role in slave labor on their website. *See Responsibility for the History of the Company, supra* note 15. The company claims to have given, since the 1980's, 25 million Deutschmark to various groups that support their former forced laborers, but they assert that individual compensation is not possible. *See id.* Daimler Benz also claims to have supported the writing of two books about the subject. The first is entitled DAIMLER BENZ IN THE THIRD REICH by NEIL GREGOR and the second, FORCED LABOR AT DAIMLER BENZ by HANS POHL ET AL. *See id.*; *Scholarly Assessment* (visited Feb. 5, 1999) <http://www.daimler-benz.com/specials/swangs/zwarb2_e.htm>.

172. *See* SIMPSON, *supra* note 26, at 290-308 (noting which concentration camps were operated by the SS, while holding slave laborers for the companies).

173. *See Companies Affiliated With Concentration Camps, supra* note 161 (listing different companies which used concentration camps for their production).

174. *See* Class Action Complaint 7-12, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed on Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

175. *See id.* at 7-8.

176. *See id.*

177. *See id.*

178. SIMPSON, *supra* note 26, at 90.

E. *Post World War II*

1. Reparations

After WWII, the West German government acknowledged their crimes and pledged to pay Israel for Germany's crimes against the Jewish people.[179] Since then, West Germany has paid billions of Deutschmark in reparations,[180] including payments to Israel for the influx of Jewish refugees after WWII.[181] The West German effort included the creation of a pension program in 1953 for more than 500,000 Holocaust survivors.[182] From 1953 to 1997, its total cost to the West German government was over $58 billion.[183] Eyebrows were raised regarding the German government's pension program to holocaust survivors, however, because it was less substantial than funds pledged to German World War II veterans.[184] What made the disparity so offensive was that some of the WWII veterans were Nazi SS officers that helped perpetrate the Holocaust.[185]

The German government was not the only party prosecuted for crimes against Jews and others during the war; several lawyers after the Nurem-

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179. *See* Lorraine Adams, *The Reckoning*, WASH. POST, Apr. 20, 1997, at W8 (stating that "Germany provides the money, but it is a Jewish group the Conference on Jewish Material Claims Against Germany that must decide which Holocaust survivors receive reparations, and which do not").

180. *See Financial Aid, Years of Committed Indirect Help* (visited Feb. 5, 1999) <http://www.daimler-benz.com/specials/zwangs/zwarb4_e.htm> (examining "[t]he possibility of individual compensation for forced laborers," but ruling it out because of problems with the practicalities of such a program).

181. *See* 3 HILBERG, *supra* note 27, at 1177-78 (describing the good-will of the West German government after negotiations failed with the Allies).

182. *See* Adams, *supra* note 179 (explaining how the West Germans have paid pensions for over 40 years and are now thinking about the future when they do not have to pay them anymore). There have been three categories of pension programs to Holocaust survivors. *See id.* The first plan was started in 1952 and stopped accepting applications in 1965. *See id.* It was the largest of all the reparation groups and paid out to around 280,000 survivors. *See id.* At first, this pension was sufficient, but now it has been cut down. *See id.* The second plan, which is still accepting applicants, was started in 1980 as a response to the influx of refugees to the United States and Israel from East Germany, and paid out a one time reparation of about $3,000. *See id.* The third plan started in 1993 and covered about 38,000 people. *See id.* About $757 million was set aside for the plan. *See id.* There are additional programs like the Hugo Princz pension plan for American citizens who were forced into concentration camps and programs to redistribute property to survivors. *See id.* The Conference on Jewish Material Claims Against Germany, which distributes all of the funds given by Germany to survivors in the manner they see fit, has been sharply criticized. *See id.* As funds have become scarcer some people have been declined money from the pensions administered by the Conference. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

berg trials took action against companies like Krupp and I.G. Farben.[186] Nevertheless, even when the German government sought to pay compensation, the compensation did not include repayment for slave labor claims.[187] The government refused to take any responsibility for private companies' actions or crimes.[188] Subsequent to this pronouncement by the German government, several lawsuits were filed in Germany against companies in the 1950's and 1960's.[189] Unfortunately, German courts did not want to participate in lawsuits against such companies.[190] With the few exceptions listed below, the victims of the slave labor camps were not compensated by the companies which had enslaved them during the War.[191]

I.G. Farben made select reparations in the early 1950's to certain survivors in the amount of $1,200 per survivor.[192] At the same time, a lawyer named Benjamin Ferencz began to pressure Krupp for similar compensation.[193] Under the German law of the time, anyone convicted under a criminal statute could be liable for civil redress to the victims.[194] Because the head of Krupp was convicted at the Nuremberg trials for his criminal actions, Ferencz, thought redress for Krupp's victims would be an easy task.[195] It was not.[196] Krupp fought every step of the way and even, at

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186. *See* MANCHESTER, *supra* note 45, at 790 (theorizing that since Krupp and others were found guilty under criminal law at Nuremberg, they should also be liable under civil law).

187. *See* LESS THAN SLAVES, *supra* note 17, at xvii (clarifying that the West German government did pay reparations to survivors, but none of these reparations was in compensation for the labor of any survivors).

188. *See id.* (concluding that there was a gap in the reparations program regarding compensation for the labor performed by the forced laborers).

189. *See id.* at xx (describing how former survivors did not want to rely on the German government so they took their claims to German courts).

190. *See id.* at xxi (recounting how "German courts made it clear that this was one problem they would rather avoid than resolve."). Subsequently, the former laborers lost resolve to continue their actions in German courts. *See id.*

191. *See id.* There were five agreements made between former slave laborers and the companies. *See* 3 HILBERG, *supra* note 27, at 1172 (summarizing the information from Benjamin B. Ferencz's book, LESS THAN SLAVES). The companies that made these agreements were Farben, Krupp, AEG, Siemens, and Rheinmetall. *See id.*

192. *See* MANCHESTER, *supra* note 45, at 789 (discussing Ferencz's appeals to German companies for compensation).

193. *See id.*

194. *See id.* at 790 (explaining that since the West German government had adopted the Nuremberg verdicts, Krupp was a criminal and, therefore, subject to criminal liability).

195. *See id.*

196. *See id.* (pointing out that if Krupp was forced to pay Jews for their labor, then non-Jews would also assert claims against the corporation thus causing the damages to rise to an estimated $50 million).

times, made anti-Semitic comments in negotiations.[197] Krupp stalled in order to let lawsuits against other German corporations play their course and see what precedent they set.[198] The company also took advantage of the time it would take for a lawsuit to go through the German legal system.[199] Additionally, survivors were reluctant to bring suits in Germany because they did not want to rely on German lawyers.[200]

As a war criminal, Alfried Krupp was forced by the Allies to sell his German metal interests.[201] Therefore, Krupp was trying to acquire interests in countries outside of Germany, with the United States being one of those countries.[202] Ferencz and other lawyers seeking reparations used the threat of a class action suit against Krupp in the United States to their advantage.[203] And, in 1959, an agreement with Krupp became a reality.[204] Krupp finally paid a lump sum settlement to the survivors of some of their camps.[205] Due to low estimates of the number of survivors, however, the settlement was inadequate to pay off all the survivors.[206] When the funds were exhausted, Krupp implied the Jewish claimants were greedy.[207]

In 1946, Hermann von Siemens testified in a lawsuit against his company that, in fact, the company did conscript labor, but that in no way did any of the laborers get mistreated.[208] The Jewish Claims Conference learned in 1960 that Siemens made a report about its use of forced laborers shortly after the war.[209] Because of Adolf Eichmann's trial in Israel in 1960 and Siemens' entrance into the U.S. market, a resurgence of inter-

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197. *See id.* at 790-91.

198. *See* LESS THAN SLAVES, *supra* note 17, at 79 ("If the claimants were defeated in the other cases, precedent could provide Krupp with an impenetrable legal shield.").

199. *See id.* at 81 (explaining that an agreement could be good for both sides because a humanitarian gesture would make Krupp look good and there would not be a long drawn out court case that the survivors would have to endure).

200. *See id.* at xvii (explaining how Jewish claimants wanted to rely on a legal aid society rather than bringing claims in Germany).

201. *See id.* at 79.

202. *See id.* at 79-80 (explaining how Krupp's business all over the world was prioritized over dealing with their slave labor problem).

203. *See id.* at 84-85 (discussing the business Krupp was conducting with Chase Manhattan Bank and the possibility of a civil suit).

204. *See* MANCHESTER, *supra* note 45, at 791.

205. *See id.*

206. *See id.* at 792 (recounting how laborers who received payments from Krupp received around $750).

207. *See id.* at 792-93 (discussing the appeals for supplemental funds when it surfaced that the parties had underestimated the amount of parties).

208. *See* LESS THAN SLAVES, *supra* note 17, at 117 (noting that Herman von Siemens was aware of the use of slave laborers by his company).

209. *See id.* at 119.

est in Siemens' involvement occurred.[210] When lawyers approached the company about compensation, the company refused to present the report.[211] Siemens' legal representatives were surprised with the prospect of having to compensate their laborers.[212] Notwithstanding, in 1961, the report surfaced after much haggling with the company for a settlement.[213]

Siemens agreed to a settlement, but like the Krupp agreement, it had severe drawbacks.[214] The first line of the contract explained that Siemens was making the payments not because it had "moral obligations," but because they had "moral contemplations."[215] The contract called for a fund that, at the time, was the equivalent of $1,250,000.[216] An auditor, appointed by both the Jewish groups and the company, would have to approve each application made by a survivor.[217] Consequently, of the 6,000 claimants that applied for redress, only a third received payment.[218] When the research to determine who was a slave laborer was completed, each successful applicant received 3,300 Deutschmark or $825.[219]

Unlike previous lawsuits, in days just after the *Pollack* lawsuit was filed, the German government urged the companies not to settle.[220] However, two notable funds were offered to former slave laborers.[221] Volkswagen and Siemens started pension plans of around $12 million each.[222] In addition, several proposals were made for the creation of a fund, into which an estimated 79 German companies could contribute.[223]

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210. *See id.* at 119-20.

211. *See id.* at 119.

212. *See id.*

213. *See id.* at 119-20 (explaining that finding the report was important to the negotiation process).

214. *See* LESS THAN SLAVES, *supra* note 17, at 121-22 (describing the difficulty in reaching a final settlement agreement). Siemens, at one time, even excused its actions by stating that it "could not avoid the employment of concentration camp inmates and had done everything in its power to alleviate the suffering of the slave laborers." *Id.*

215. *See id.* at 121.

216. *See id.* at 122.

217. *See id.*

218. *See id.*

219. *See id.* at 127 (observing that the claimants who had toiled for Siemens made their claims from countries all over the world, but in the end they received so little from the company that caused them so much pain).

220. *See* Imre Karacs, *German Firms Count Costs of Slave Labor,* INDEPENDENT - LONDON, Nov. 9, 1997, at 15 (describing the German government's stance as having to draw the line somewhere).

221. *See* Yojana Sharma, *Minorities-Germany: Gypsies Seek World War II Recompense,* INTER PRESS SERVICE, Sept. 24, 1998, *available in* 1998 WL 19900638 (explaining how Gypsies are considering their compensation claims against Germany).

222. *See id.* (reporting that Volkswagen will consider claims on an individual basis).

223. *See id.* (reporting a possible fund for Jews, Gypsies, and other aggrieved groups of WWII).

In February of 1999, meetings between representatives of German industry and government, Jewish groups, and plaintiffs' lawyers started solidifying a plan to create a general fund into which German companies could contribute monies.[224] On February 16, 1999 the plan was announced.[225] The participants in the fund stated that the fund should total between $3.5 to $4.6 billion and the total recipients will be between 200,000 to 300,000 people worldwide.[226] Several companies, which organizers expect should join the fund, have not decided if they want to be involved.[227] Yet, Ed Fagan, attorney for the plaintiffs in *Pollack*, said in an interview that he will continue the actions against the companies, unless more companies make contributions, because he feels that the plan, as is, is inadequate.[228] The fund is meant to go into effect on September 1, 1999.[229]

2. Holocaust Claims

Fishel v. BASF Group[230] and Hugo Princz's story[231] each, in their own way, add insight to the *Pollack* lawsuit. The *Fishel* case is the most similar to the *Pollack* case with respect to facts; it was the first true Holocaust slave labor case.[232] Although, the plaintiff was not successful in an Iowa federal court, there could be a very different result in a New York federal court where the Second Circuit has made some enlightened decisions in the past 20 years regarding international human rights.[233] Additionally,

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224. *See German Official to Push Holocaust Reparations Plan, supra* note 14 (noting that Holocaust survivors, senior German officials, World Jewish Congress officials, and Deutsche Bank officials are parties to the plan).

225. *See* Czuczka, *supra* note 9 (reporting the creation of a fund by German companies like Deutsche Bank, Daimler-Benz, DaimlerChrysler, and Siemens).

226. *See id.* (quoting Bodo Homback, Schroeder's chief of staff).

227. *See* Nelan, *supra* note 15.

228. *See Dateline NBC, supra* note 41.

229. *See* Nelan, *supra* note 15.

230. 175 F.R.D. 525, 527 (S.D. Iowa 1997).

231. *See* Sumathi Reddy, *Prisoners of Memories*, THE PROVIDENCE SUNDAY J., Sept. 28, 1997, *available in* 1997 WL 13860869 (explaining Holocaust survivor Hugo Princz's forty year fight for reparation)

232. *Compare* Fishel v. BASF Group, 175 F.R.D. 525, 527-28 (S.D. Iowa 1997) (describing the plaintiff's claims against certain German corporations because they allegedly enslaved him), *with* Class Action Complaint 1-2 Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (stating that the "[d]efendants conspired with the Nazi Regime and other un-named German industrial entities to use Holocaust victims as slave laborers, and illicitly profited from such forced labor").

233. *Compare Holocaust Lawsuit Thrown Out Judge Rules Federal Court Lacks Jurisdiction in Survivor's Case*, OMAHA WORLD-HERALD, Mar. 17, 1998, at 13 (quoting the judge as saying that there is no evidence that the companies sell their products in a systematic manner in Iowa), *with* Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.22 (2d Cir. 1980)

the *Princz* case should serve as the inspiration for human rights claimants to bring their cases. It shows that victims can get compensation and an admission of responsibility from their oppressors, even after forty years of fighting for justice.[234]

a. The *Fishel* Case

The plaintiff in *Fishel* v. *BASF Group* was a slave laborer during the Holocaust, thereby making *Fishel* a close cousin to the *Pollack* case.[235] *Fishel*, decided in March of 1997, is believed to be first of the Holocaust slave labor cases.[236] In that case, David Fishel alleged that the defendant corporations should be responsible for paying damages because they forced him into slavery during the Holocaust.[237] The defendant corporations included not only I.G. Farben and its descendant corporations BASF, Hoechst, and Bayer, but also Mercedes-Benz, and Krupp.[238]

Fishel brought suit in federal district court in Iowa.[239] The companies challenged the lawsuit with a number of different theories. First, the defendants alleged the present day or post-war companies are different in form from the Nazi era companies because the post-war companies were newly created after the Second World War.[240] Second, the companies challenged the proceedings for lack of jurisdiction.[241] Finally, the defend-

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(noting that the court may have jurisdiction over a torture claim in violation of international law under 28 U.S.C. § 1331 (1994)), *and* Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (granting jurisdiction for violations of international law).

234. *See* Tom Tugend, *U.S. Survivors of Nazi Camps can get German Compensation*, JEWISH TELEGRAPHIC AGENCY, June 17, 1996, at 2 (stating that Princz sought reparations from the German and U.S. governments for 40 years).

235. *See* Fishel v. BASF Group, 175 F.R.D. 525, 527 (S.D. Iowa 1997).

236. *See* Jeff Zeleny, *Labor Victim Suing German Firms*, DES MOINES REG., Aug. 10, 1997, at 1.

237. *See Fishel*, 175 F.R.D. at 527.

238. *See id.*

239. *See id.*

240. *See id.* This argument shows shortsightedness and ignorance of post-war occurrences; it also appeals to common thought about these occurrences. *See* Neil H. Weinfield et. al., *Letters to the Editor: VW and the Sins of the Fathers*, WALL ST. J. EUROPE, Sept. 29, 1998, *available in* 1998 WL 2732750. The reputation of the German firms were still intact after the war. *See id.* When the Allies relinquished the companies back to their German owners in 1950, the owners kept the pre-war names of the firms because of their reputations. *See id.* However, keeping those names intact throughout the war was done on the backs of slave laborers who never were compensated. *See id.* The argument that a successful claim would be punishing the innocent sons of the companies that actually committed the horrors is misleading. German manufacturers talk proudly about their history, yet they would never mention that the company that built beautiful cars before WWII is different from the present day company. That would be bad for nostalgia and probably new news to present day investors of the companies' stock and vintage automobiles.

241. *See Fishel*, 175 F.R.D. at 527.

ants made a statute of limitations challenge alleging that the plaintiffs cause of action had tolled because 50 years had passed since the occurrences alleged.[242]

District Court Judge Longstaff dismissed the case citing statute of limitations and jurisdictional issues as a bar to the suit.[243] Judge Longstaff held "'[t]here is no evidence any defendant maintains an office, employees or agents, bank accounts or registered agents in Iowa . . . [n]or do any of the defendants themselves systematically sell their products in Iowa.'"[244]

b. The Hugo Princz Case

The Princz case illustrates some of the significant legal barriers a human rights claimant faces. Hugo Princz fought two governments for over 40 years to obtain compensation for his experiences during World War II.[245] Princz, who was born to an American businessman, was living in Europe at the time World War II erupted.[246] Although he was born in Europe, he was a United States citizen because of his father's nationality.[247] The Nazis imprisoned Princz and his entire family; everyone in his family was killed during the Holocaust except for Princz.[248]

In 1955, when Princz applied for the German pension plan paid to Holocaust survivors, Princz did not meet the criteria because he was not a German citizen or a refugee.[249] Again, in 1984, when Princz renewed his request for reparations from the German government, I.G. Farben, and Messerschmidt, Princz was denied reparations by the German government.[250] After his second denial there were several failed diplomatic appeals by the U.S. government.[251] In 1992 Princz initiated a lengthy

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242. *See id.* (alleging that the claims were barred by the statutes of limitations).

243. *See Holocaust Lawsuit Thrown Out Judge Rules Federal Court Lacks Jurisdiction in Survivors,* OMAHA WORLD-HERALD, Mar. 17, 1998, at 13 (describing how the Judge agreed with defense attorneys' arguments that the suit should be dismissed).

244. *Id.*

245. *See* Tugend, *supra* note 234 (detailing the Holocaust Claims Program which allows U.S. Holocaust survivors to file claims with the U.S. Department of Justice).

246. *See id.* (stating that Mr. Princz was a U.S. citizen when he was imprisoned by the Nazis).

247. *See id.* (explaining that Princz was born to a naturalized American citizen which made him a U.S. citizen).

248. *See id.* (recounting how Princz's parents and six siblings died in Nazi camps).

249. *See* Princz v. Federal Republic of Germany, 26 F.3 1166, 1168 (D.C. Cir. 1994) (stating that the German government denied Mr. Princz reparations' claim in 1955).

250. *See id.* (describing the method in which Mr. Princz, the United States Department of State and New Jersey congressional members brought actions against the German government and I.G. Farben in 1984).

251. *See id.* (explaining how the United States Department of State joined Mr. Princz in a series of diplomatic appeals that failed).

litigation process which culminated in the dismissal of his case because Princz's actions during World War II did not directly affect the United States, therefore the Foreign Sovereign Immunities Act (FSIA) barred the action.[252]

After FSIA was deemed a bar to Princz's lawsuit, his lawyers changed their tactics and turned to the media and to Congress for help with Princz's case.[253] President Clinton put pressure on the German government to make an agreement.[254] In June of 1996, the two governments came to a settlement agreement.[255] The agreement settled ten victims' cases including Princz's.[256] The parties included in the settlement were all U.S. citizens during World War II.[257] More victims that fit this description, including U.S. soldiers, were given reparations in a subsequent agreement made in 1997.[258]

III. BARRIERS THE *POLLACK* PLAINTIFFS FACE IN BRINGING THEIR CASE TO TRIAL

A. *Introduction*

Holocaust claims and other types of human rights litigation face several barriers. The first barrier is jurisdiction. There are two types of jurisdiction, subject matter jurisdiction and personal jurisdiction, both of which play a role in a human rights defendants' plan to derail a case. Before I focus on these two principals, I discuss the Second Circuit's jurisprudence starting with *Filartiga*, a landmark human rights case, which shows the circuit is ripe for more human rights litigation because of its recent rulings in the area of jurisdiction. Additionally, there are two pre-trial motions that may bar plaintiffs from continuing their claims. These pre-trial motions are based upon the formalities of a statute of limitations and the principle of *forum non conveniens*.[259]

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252. *See id.*

253. *See* Marilyn H. Karfeld, *Forgotten Holocaust Victims Will Finally Receive Justice: U.S. Citizens Interned in Concentration Camps to Get Compensation from Germany*, CLEV. JEWISH NEWS, Nov. 28, 1997, *available in 1997* WL 11590040.

254. *See id.*

255. *See id.*

256. *See id.*

257. *See id.*

258. *See id.*

259. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) (describing The Torture Victim Act as having a ten year statute of limitation). *See also* Boyd, *supra* note 19, at 58 (describing *forum non conveniens* as a significant bar to litigation in human rights cases in the United States and reasoning why this doctrine should be abolished in such cases).

B. *The Second Circuit: Filartiga and its Progeny*

In 1980 the Second Circuit decided the landmark case *Filartiga v. Pena-Irala*.[260] This decision was the first case in which a United States court recognized international human rights standards while trying to remedy an injustice that occurred in a foreign country.[261] The parties had no ties to this country at the time the cause of action accrued.[262]

The *Filartiga* case was spawned by the actions of a Paraguayan official.[263] The plaintiffs Joel and Dolly Filartiga were citizens of the Republic of Paraguay and long time vocal opponents of the Paraguayan government which was in power during the 1970's.[264] In an attempt to gain information on Dr. Filartiga's political activities, a high ranking police official, Américo Pena-Irala, kidnapped, sadistically tortured, and killed Dr. Filartiga's seventeen-year old son, Joelito.[265]

Using a visitor's visa, Pena entered the United States in 1978, but stayed past the terms set out in the visa.[266] Dolly Filartiga, living in Washington D.C. at the time, discovered Pena was in the United States.[267] Subsequently, the Filartigas served Pena with a civil complaint for wrongful death while Pena was waiting to be deported.[268]

Judge Nickerson, the district court judge, dismissed the case for lack of subject matter jurisdiction, but the decision was appealed to the U.S. Court of Appeals for the Second Circuit.[269] There was an overwhelming response to the case in the media and numerous amicus curiae briefs

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260. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (recognizing the court's decision as a "small but important step in the fulfillment of the ageless dream to free all people from brutal violence"); *see also* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 23, at 295 (discussing the importance of *Filartiga* to human rights enforcement in the United Sates).

261. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 23, at 295 (explaining that traditionally the judicial branch of the government does not venture into international human rights law because this area is usually left to the legislative or executive branches). The executive branch and the legislative branch, however, are usually too constrained by politics to make a difference in the area of human rights. *See id.*

262. *See id.*

263. *See Filartiga*, 630 F.2d at 878 (describing the facts of the case).

264. *See id.*

265. *See id.*; HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 23, at 329-30 (detailing the facts of the *Filartiga* case).

266. *See Filartiga*, 630 F.2d at 878-79.

267. *See id.*

268. *See id.* at 879.

269. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 23 at 332 (describing the litigation between Pena and the Filartigas).

were filed with the court.[270] The Second Circuit ruled that torture was a violation of international law, thereby invoking the court's jurisdiction.[271] The case was remanded to Judge Nickerson's court and the Filartigas won a ten million dollar judgment[272] which would remain unpaid. By that time, Pena had been deported.[273]

In *Filartiga*, the plaintiffs based their jurisdiction on the Alien Tort Statute.[274] Under Section 1350, a court has jurisdiction when an alien to the United States brings an action in tort that violates "the law of nations or a treaty of the United States."[275] Interpreting other judges' writings as well as "the customs and usages of civilized nations,"[276] the *Filartiga* court recognized torture as a violation of international law.[277] The court ruled that torture perpetrated by a country on its own citizens is of international concern and provides jurisdiction to U.S. courts.[278]

In 1995, the Second Circuit reinforced *Filartiga* in *Kadic v. Karadzic* by extending the *Filartiga* doctrine's reach.[279] *Kadic* held that violators of international law include those acting under the power of a government and also private citizens acting in their individual capacity.[280] In addition, the court listed other potential violations of international law: (1) slavery, (2) piracy, (3) genocide, (4) war crimes, and (5) "other instances of inflicting death, torture, and degrading treatment."[281] These crimes are so heinous, the court ruled, that they are of "universal concern" and "permits states to establish appropriate civil remedies."[282]

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270. *See id.* at 333 (recounting how some well known legal writers have rebutted the notion that "problems arising under the international law of human rights may not be dealt with by domestic courts").

271. *See* Filartiga, 630 F.2d 876, 889 (granting original jurisdiction based on the Alien Torts Claim Act, 28 U.S.C. § 1350 (1998)).

272. *See* Human Rights in the World Community, *supra* note 23, at 336.

273. *See Filartiga*, 630 F.2d at 880.

274. *See id.* at 878 (ruling that "whenever an alleged torturer is found and served with process by an alien within our borders, Section 1350 provides federal jurisdiction").

275. The Alien Torts Claim Act, 28 U.S.C. § 1350 (1994).

276. *See Filartiga*, 630 F.2d at 880 (describing when it is appropriate to resort to customary international law).

277. *See id.* at 884 (deciding that in fact a state can not violate its own citizens' human rights).

278. *See id.* at 881-90 (explaining that every country officially decries torture and since torture is universally outlawed it is a crime with universal jurisdiction).

279. *See* Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995) (citing Filartiga).

280. *See id.* at 239 (addressing several United States Supreme Court cases which have applied international law concepts proscribing slavery to private citizens).

281. *See id.* at 240-41 (analyzing various international treaties that generally describe crimes against humanity).

282. *See id.*

Kadic is set against the backdrop of the atrocities that have occurred in the former Yugoslav Republic.[283] The plaintiffs, who are Croat and Muslim citizens, alleged that Karadzic, the President of the Bosnian-Serb Republic, ordered his forces to commit such atrocities as rape, torture, and summary execution.[284] Karadzic was served a summons while in the United States on United Nations business.[285] The court ruled that the atrocities alleged by the plaintiffs, even if committed by private individuals, were violations of international law and thus invoked the jurisdiction of the district court.[286]

Because none of the plaintiffs in *Pollack* are aliens to the United States,[287] however, they are unable to sue under the Alien Tort Statute. Nevertheless, United States citizens should be able to bring claims for violations of their human rights under another set of statutes. In *Pollack*, the plaintiffs have based jurisdiction on the federal question statute and the diversity of citizenship statute.[288] In dicta, *Filartiga* and *Karadzic* suggested that their reasoning could be used to uphold jurisdiction under the general federal question statute, the Second Circuit has not ruled on the issue.[289]

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283. *See id.* at 236 (illustrating the facts of the case).

284. *See id.*

285. *See Karadzic*, 70 F.3d 232, 237.

286. *See id.* at 241-43 (outlining the progression of outlawing crimes against humanity).

287. *See* Alien Torts Claims Act, 28 U.S.C. § 1350 (1994) (limiting the district court's jurisdiction to cases brought by aliens). American citizens cannot sue under 28 U.S.C. § 1350. *See id.* However, other parts of the code provide viable alternatives for the *Pollack* plaintiff's assertion of jurisdiction. *See* 28 U.S.C. § 1331 (1994) (giving district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"); *see also* Anthony D'Amato, *Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 98 (1985) (criticizing Judge Bork's concurring opinion in *Tel-Oren* as overbroad and as posing the threat of "wip[ing] out the invocation of customary international law in American courts").

288. *See* Class Action Complaint 2, Pollack v. Siemens AG, NO. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

289. *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stating that the court recognizes the possibility of Section 1331 jurisdiction, but because Section 1350 provides a remedy the court does not need to rule on Section 1331 jurisdiction); Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.22 (2d Cir. 1980) (realizing that the court could exercise jurisdiction under Section 1331).

C. *Jurisdictional Issues*

The jurisdiction issue is the threshold question in any human rights claim.[290] The term jurisdiction "refers to a state's legitimate assertion of authority to affect legal interests."[291] Both types of jurisdiction, personal and subject matter, are likely to be at issue in a human rights case. For example, in cases similar to *Pollack*, defendants have filed motions for summary judgement stating that the court lacks jurisdiction over the case and the parties.[292]

Personal jurisdiction has been defined as the court's "power to render a judgment against [a] particular defendant."[293] On the other hand, subject matter jurisdiction is the court's power to "hear a particular dispute."[294] Congress has enacted a number of statutes which establish the federal district and intermediate appellate courts' subject matter jurisdiction.[295] The following arguments for invoking jurisdiction in the *Pollack* case are intended to be a model for any human rights case.

1. Subject Matter Jurisdiction

The plaintiff class in the *Pollack* case have plead subject matter jurisdiction under Title 28 U.S.C. Sections 1331 and 1332(a).[296] The following discussion first focuses on subject matter jurisdiction arising under Section 1331 and second discusses subject matter jurisdiction under Section 1332(a).

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290. *See* Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 355-56 (1988) [hereinafter Randall, *Federal Questions*] (suggesting that a "human rights litigant must allege an adequate statutory basis for federal subject matter jurisdiction" and that Section 1331 provides an alternative to claimants because of the judiciary's confining interpretations of other sections in Title 28).

291. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786 (1988) [hereinafter Randall, *Universal Jurisdiction*].

292. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (writing that the defendant filed motions to dismiss for lack of personal and subject matter jurisdiction); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (describing how the district court dismissed the case for lack of subject matter jurisdiction); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam) (deciding that the district court properly held that it lacked subject matter jurisdiction); Fishel v. BASF Group, 175 F.R.D. 525, 527 (S.D. Iowa 1997) (stating that the defendants filed a motion to dismiss based on lack of personal jurisdiction).

293. STEPHEN C. YEAZELL, CIVIL PROCEDURE 12 (1996) (instructing that defendants can only be brought within the power of a court if there is personal jurisdiction).

294. *Id.* at 6 (splitting subject matter jurisdiction into two categories, general and limited).

295. *See* 28 U.S.C. §§ 1291, 1331-1332 (1994) (outlining the jurisdictional requirements for the courts of appeals and the district courts).

296. *See* Class Action Complaint 2, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

a. 28 U.S.C. § 1331

The federal question statute, Section 1331, furnishes district courts with jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States."[297] Two possible avenues for jurisdiction in the *Pollack* suit emanate from Section 1331's language: the terms "treaties" and "laws."[298] There are two essential questions when determining whether international standards of human rights give rise to a personal cause of action under either the "treaties" language or the "laws" language. The first, is whether the cause of action alleged would be a violation of international human rights standards.[299] The second, is whether a private right to a cause of action arises from these standards.[300] The "treaties" language and the "laws" language of Section 1331 may give rise to a private cause of action for a *Pollack* human rights claim against the named defendants.

i. The "Treaty" Language

Under the "treaties" language analysis, the first question is whether the *Pollack* defendants violated a treaty to which the United States was a party.[301] In order to prevent the retroactive application of international law in human rights cases under Section 1331, the court must look to the concepts of international law at the time of the alleged violation.[302]

The precedent provided by the Nuremberg Trials shows that the *Pollack* defendants violated international law as it was at the time of

297. 28 U.S.C. § 1331 (1994).

298. *See* Randall, *Federal Questions*, *supra* note 290, at 349, 376-77, 394-95, 406-07 (describing federal case law that supports a claimant's cause of action under Section 1331 on either a laws theory or a treaties theory).

299. *See id.* at 394 (asking whether "international law, as accepted by the United States, recognizes the human rights of the plaintiff allegedly violated by the defendant").

300. *See id.* at 441 (describing that in order to find a cause of action for apartheid, a federal judge would have to interpret the Apartheid Convention as part of United States' customary law and *then* "derive a private cause of action from that customary law").

301. *See id.* at 394 (asking how a cause of action under positive international law arises). If a defendant violated an international law agreed to by the United States then the plaintiffs should be able to invoke Section 1331 jurisdiction. *See id.*

302. *See* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 249 (1995) (stating that the court must look at the circumstances as they appeared to the defendants at the time of the alleged criminal activity). One could argue that under international law, human rights violators could be held accountable under present international law concepts rather than those in effect when the defendant allegedly violated these laws. *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980). In *Filartiga*, the court held that "courts must interpret international law not as it was . . . but as it has evolved and exists among the nations of the world today." *Id.*

WWII.[303] A case in point would be the Allies' prosecution of Alfried Krupp on charges of crimes against peace, spoliation and plunder, and slave labor.[304] Because of the way Krupp conscripted laborers, the Nuremberg court ruled that he had violated Article 52 of the Hague Convention.[305] Article 52 allows a conquering power to demand the services of the people inhabiting the area "so long as such obligations are intended to meet the 'needs of the army of occupation,' are in 'proportion to the resources of the country,' and do not involve the inhabitants in the obligation to take part in military operations against their own country."[306]

The Nuremberg Court ruled that Krupp's actions clearly violated international law at the time because his company required its laborers to build equipment that was furthering the war effort and their enslavement.[307] By convicting individual violators of international law, the Allies "extended personal liability under international law to private individuals as well as to public officials."[308] The Second Circuit reaffirmed the Nuremberg principles by recognizing a private right of action under international law.[309] A civil suit for damages like the *Pollack* case would be a natural extension of the Nuremberg trials; a suit such as this would be awarding the plaintiffs damages they deserve and, at the same time, strengthening the precedent set by Nuremberg.[310]

Still left unanswered, however, is whether the "treaty" language of Section 1331 can provide for a private cause of action. The D.C. Circuit held that international laws do not give private individuals a cause of action in *Tel-Oren v. Libyan Arab Republic*.[311] The plaintiffs in *Tel-Oren* brought

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303. When Germany surrendered in 1945, the Allies, including England, France, the United States, and Russia, established a procedure for trying the Nazis war criminals. Crimes against humanity and crimes against the peace were two of the counts for which one could be tried as a war criminal. *See* Ramasastry, *supra* note 32, at 395.

304. *See* Lippman, *supra* note 302, at 232-39 (illustrating the various charges against Krupp and its officials).

305. *See id.* at 247-48 (noting how the Tribunal decided that Krupp's use of labor violated all standards of human decency).

306. *See* Convention Between the United States and Other Powers Respecting the Law and Customs of War on Land, Oct. 18, 1907, art. 52, 36 Stat. 2277, 2308 (mandating in Article 52 that an invading army can not make requisitions on local communities).

307. *See* Lippman, *supra* note 302, at 248 (describing that the tribunal found Krupp's behavior disregarded the "standards of decency and humanity").

308. *See id.* at 249 (reviewing the doctrinal developments set by Nuremberg).

309. *See* Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) (stating that since WWI private individuals can be held liable for committing war crimes).

310. *See Dateline NBC*, *supra* note 41 (quoting Ed Fagan's reasoning for why the *Pollack* plaintiffs should go to trial and not settle).

311. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808, 809 (D.C. Cir. 1984) (Bork, J., concurring) (stating that of all the treaties plead by the plaintiffs, the defendants

their claim under both Section 1331 and Section 1350, but it was dismissed by the trial court for lack of jurisdiction.[312] On appeal, the D.C. Circuit Court upheld the dismissal.[313] In his concurring opinion, Judge Bork argued that for a treaty to provide a private cause of action, the treaty would have to directly state that it is self-executing.[314] Yet, the Court's decision to ignore *Filartiga*'s recognition of private causes of action arising from international law has been criticized by commentators.[315]

Judge Bork's main fear was that all non-self-executing treaties would become self-executing under Section 1350.[316] This, however, is not possible. An example of two types of treaties will clarify this problem.[317] An example of a non-self-executing treaty would be an agreement between two nations that regulates the import and export of a product between the two countries.[318] If the treaty is somehow violated, an individual would not have a private cause of action under international law, because the individual is not hurt directly by the violation; only the economy in

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violated only five of the treaties which are binding on the United States and none of these five provide a private cause of action). Judge Bork suggests that the five binding treaties are not self-executing because they are meant to be agreements binding on states to pass specific legislation for specific purposes. *See id.* In 1978, members from the Palestinian Liberation Organization (PLO) landed in Israel and took over a tourist bus with citizens from Israel, the United States, and the Netherlands. *See id.* at 776. By the time the Israeli police took control of the situation, 34 tourists were dead. *See id.* The victims filed suit in the D.C. district court; however, the district court judge dismissed the case for lack of subject matter jurisdiction. *See id.* at 776.

312. *See id.* (reporting that the court dismissed the suit for lack of subject matter jurisdiction).

313. *See id.* at 775.

314. *See id.* at 808-10 (arguing that the federal court system should not activate treaties for private action because this would cause the court system to be inundated with lawsuits after a war). *Cf.* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987) (finding that litigants should be allowed a cause of action under Title 28, Section 1350 for certain "international common law torts").

315. *See, e.g.*, D'Amato, *supra* note 287, at 93 (stating that the Tel-Oren decision is a set back for the enforcement of human rights); Randall, *Federal Questions*, *supra* note 290 at 397-98 (arguing that Judge Bork's argument "begs the essential question of whether individuals have private causes of action for certain international law violations").

316. *See* D'Amato, *supra* note 287, at 99-100 (dispelling the myth that a non-self-executing treaty can not be self-executing and provide a private cause of action; further stating that a "non-self-executing treaty would be 'violated' in a manner that could cause harm to an individual plaintiff").

317. *See id.* at 99 (making a distinction between treaties that regulate trade and those that enforce human rights).

318. *See id.* (using the example of a treaty that regulates the trade of hams between two nations).

general is affected.[319] No court in the United States would grant a private cause of action in that case.[320] However, in the case of a treaty meant to regulate human rights, individuals are the target of the treaty's protection.[321] An example of such a treaty is the Torture Convention.[322]

Another argument against Judge Bork's stance is that the human rights standards provided for in international law are the same as those provided in the broad language of our Constitution.[323] The personal rights included in such treaties as the Torture Convention are the same as those self-executing rights in such Constitutional clauses as the Due Process Clause of the Fourteenth Amendment.[324] The Constitution provides that "[no] person shall be . . . deprived of life, liberty, or property, without due process of law."[325] More importantly, the constitution also provides that slavery and involuntary servitude shall not exist within the jurisdiction of the United States.[326] The international human rights standards are very similar to those same rights given to us in the Constitution.[327] Therefore, enforcement of such rights would not subject a defendant to an unforeseen situation.

ii. The "Laws" Language

Another way subject matter jurisdiction arises from Section 1331 is from the "laws" language of the statute.[328] Implied from the word "laws"

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319. *See id.* (stating that the country whose economy is adversely affected has a cause of action rather than a private party).

320. *See id.* at 99 n.21 (claiming that close to 5,700 cases have denied a claim based on a non-self-executing treaty regulating trade).

321. *See id.* (emphasizing that when human beings are directly hurt non-self-executing treaties become self-executing).

322. *See* Randall, *Federal Questions, supra* note 290, at 398 (proposing that federal rights include the right to be free of such crimes as torture and slavery). The Torture Convention is a treaty signed by the members of the U.N. to prevent all forms of torture. *See* THOMAS BUERGENTAL, INTERNATIONAL HUMAN RIGHTS 72-76 (2d ed. 1995) (describing the treaty as concerned with governmental actors, as well as private actors). The convention's signatories are required to pass certain legislation. *See id.* Further, the Convention places legal obligations on private individuals. *See* Randall, *supra* note 290, at 389-90 (describing the treaty as self-executing).

323. *See* Randall, *Federal Questions, supra* note 290, at 396 (summarizing those rights and duties imposed upon individuals situated differently).

324. *See id.*

325. U.S. CONST. amend. XIV.

326. *See* U.S. CONST. amend. XIII (abolishing involuntary servitude).

327. *See* Randall, *Federal Questions, supra* note 290, at 398 (acknowledging the fact that clauses in the Covenant and the Torture Convention have been used to establish laws in the United States).

328. *See* 28 U.S.C. § 1331 (1994) (granting federal district courts authority to hear claims arising out of federal questions).

in Section 1331 is an area of law that the federal judiciary has adopted and from which causes of action can be created.[329] The common law is created by federal judges when ruling on issues that are not addressed in the codified statutes or the Constitution.[330] Sometimes, this judge made law creates a cause of action through the court's ruling.[331]

When plaintiffs litigate issues concerning international law, federal common law is generally involved.[332] Federal common law is at issue because the litigant is dealing with an area of the law that has not been codified and is generally a matter of national concern.[333] Human rights, for example, are of national concern because of the United State's reliance on this factor in its foreign policy; therefore, federal common law should regulate human rights claims.[334]

The U.S. Supreme Court has ruled that international law is part of federal common law,[335] but courts are split regarding whether Section 1331 provides for a private cause of action under international law.[336] Once

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329. *See id.* at 376 (asserting that a cause of action is created "from the substantive law that the federal judiciary creates or adopts").

330. *See id.*

331. *See id.* at 376-77 (stating that *Erie* "'led to the emergence of a federal decisional law in areas of national concern'", but only in cases where there is a lack of diversity and positive federal law insufficiently regulates the interests of the federal government). In fact, Justice Douglas once ruled that "federal courts have an extensive responsibility of fashioning rules of substantive law.... These rules are fully laws of United State as if... enacted by Congress." Illinois v. City of Milwaukee, 406 U.S. 91, 99 (1972).

332. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964) (recognizing that when there is popular agreement regarding an aspect of international law, the judicial branch should be able to decide whether the rule is consistent with the national interest). In *Baco Nacional*, the Cuban government tried to sue an American commodities banker for stealing bills of lading in the United States. *See id.* at 405-06.

333. *See id.* at 428.

334. *See* 22 U.S.C. § 2151n (1994) (requiring the United States to deny assistance to any country that "engages in a consistent pattern of gross violations of internationally recognized human rights"). *See generally* Anthony D' Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982) (stating that in the 1970's, the United States made the evaluation of human rights a permanent method in which we analyze our relations with other countries).

335. *See, e.g.*, The Paquette Habana, 175 U.S. 677, 700 (1900) (finding that "[i]nternational law is part of [American] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stressing that "federal common law incorporates international law"); Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (deciding that the "law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law *of the United States* upon adoption of the Constitution").

336. *Compare* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) (suggesting that "there be an explicit grant of a cause of action

provided with the importance of human rights and the applicability of human rights mandates to individuals, courts should provide jurisdiction for a private cause of action. The human rights violated in *Pollack* are clearly a case in point.[337]

An objective look at Second Circuit jurisprudence regarding the Alien Tort Claims Act and the Federal Question Act reveals a potential inconsistency if a *Pollack* claim is denied. The *Filartiga* and *Kadic* rulings recognize a cause of action committed on foreign soil for an alien. Nevertheless, if subject matter jurisdiction is denied in cases such as *Pollack*, which base jurisdiction on Section 1331, then, potentially, a cause of action would be available in the Second Circuit for an alien, but not for a U.S. citizen. In other words, a *Pollack* plaintiff, who is an alien to the United States, will have a cause of action in the Second Circuit under the Alien Torts Claims Act because of the *Kadic* and *Filartiga* cases. However, a *Pollack* plaintiff, who happens to be a citizen of the United States, will not have a cause of action in the Second Circuit if their claim under the Federal Question Statute is denied.

b. 28 U.S.C. § 1332

The *Pollack* plaintiffs have plead in the alternative, that the court has jurisdiction under the diversity of citizenship statute.[338] Under Section 1332 district courts "have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of a state and citizens or subjects of a foreign state."[339] The plaintiffs in this case live in Pennsylvania, Ohio, New York, Nevada, Illinois, Florida, Connecticut, and

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before a private plaintiff be allowed to enforce principles of international law in federal tribunal"), *and* Handel v. Artukovic, 601 F. Supp. 1421, 1425, 1427 (C.D. Cal. 1985) (stating that the law of nations does not create a civil action unless local laws allow such actions), *with* Republic of Philippines v. Marcos, 818 F.2d 1473, 1478 (9th Cir. 1987) (granting jurisdiction based on a complaint that claims a "'right to recover under the Constitution and laws of the United States'" (quoting Jackson Transit Auth. v. Local Division, 457 U.S. 15, 21 n.6 (1982) *and* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987) (deciding that "interpretation of international law is a federal question," and a claim under international law is equally "as colorable as the RICO claim;" therefore, jurisdiction should be invoked).

337. *Cf.* Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995) (granting jurisdiction for violations of international law); Filartiga v. Pena-Irala, 630 F.2d 876, 887-89 (2d Cir. 1980) (granting original jurisdiction based on the Alien Tort Statute).

338. *See* Class Action Complaint 2, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

339. 28 U.S.C. § 1332 (1994).

California.[340] The defendants, however, are incorporated in Austria and Germany.[341] And, the amount in controversy will exceed over $75,000 per plaintiff.[342] Although the diversity jurisdiction statute does not create a cause of action, the statute does give the district court power to adjudicate a claim.[343]

2. Personal Jurisdiction

The defendants in the *Fishel* case successfully attacked the plaintiff's assertion of jurisdiction by filing a motion to dismiss for lack of personal jurisdiction based on the corporations' lack of minimum contacts with the country.[344] The present case is a diversity case because the plaintiffs are American citizens and the defendants are foreign corporations.[345] In such cases, the forum state's personal jurisdiction law will be used by the court.[346] In the *Pollack* case the forum state is New York.[347] "Under New York's [Long Arm Statute] a foreign corporation is subject to suit in New York state courts if it is engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction."[348] In *Pollack*, extensive discovery likely will be allowed to find exactly what connections the defendants or their subsidiaries have to New York.[349]

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340. *See* Class Action Complaint 3-12, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

341. *See id.* at 13-16 (listing each defendant's main office).

342. *See id.* at 2 (pleading each plaintiff's damages in excess of $75,000).

343. *See* Stephanie A. Bilenker, Comment, *In Re* Holocaust Victim's Assets Litigation: *Do the U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against The Swiss Banks?*, 21 MD. J. INT'L L. & TRADE 251, 269-70 (1997) (describing the basis for the claims against Swiss Banks under 28 U.S.C. Section 1332(a)).

344. *See Nazi Victim Can't Sue Here*, NAT'L L.J., Mar. 30, 1998, at A8 (quoting Judge Longstaff as saying "'[t]here is no evidence any defendant maintains an office, employees or agents, bank accounts or registered agents in Iowa'").

345. *See* Class Action Complaint 2, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998)) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (describing the parties in the *Pollack* suit).

346. *See, e.g.*, Koehler v. Bank of Bermuda, 101 F.3d 863, 865 (2d Cir. 1996) (discussing the jurisdictional issues of a diversity case).

347. *See* Class Action Complaint 1, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

348. Koehler v. Bank of Bermuda, 101 F.3d 863, 865 (2d Cir. 1996) (quoting N.Y.C.P.L.R. 301 (McKinney 1990)).

349. *See id.* (ruling that the court must decide jurisdiction "based upon allegations of the parties and affidavits filed in support of their arguments"). "While the plaintiff bears the ultimate burden of establishing jurisdiction over the defendant by a preponderance of the evidence, until discovery takes place, a plaintiff is required only to make a prima facie showing by pleadings and affidavits that jurisdiction exists." *Id.*

The plaintiffs allege that all the defendants either have offices or do extensive business in New York.[350] Volkswagen,[351] Mercedes-Benz,[352] Audi,[353] and BMW[354] are all automobile companies that sell an extensive amount of cars in the state of New York. Siemens sells a wide range of products all over the United States, including health care products and automation products.[355] Among the items that Krupp sells in the United States are automotive products.[356] Henkel sells a wide range of products throughout the United States including adhesives and cosmetics.[357] Leica sells cameras all over the world, including the United States.[358]

When a court evaluates whether it has jurisdiction over a foreign defendant it necessarily looks to the fairness of forcing that defendant to defend a suit in that court.[359] In the *Pollack* case concepts of fairness not only permit the court to exercise jurisdiction, but mandate that it does so. For example, in *Pollack*, the defendant corporations all do business in New York, the witnesses, most likely the plaintiffs, are in the United States and the forum would be an appropriate and convenient place for all parties to engage in this litigation. Therefore, the court should hold that the defendants are subject to its jurisdiction.

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350. *See* Class Action Complaint 13-16, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (depicting each defendant-corporation).

351. *See Test Drive, Locate a Dealer Near You* (visited Feb. 19, 1999) <http://dealerlocate.vw.com/cgi-bin/getdealerwebtable.exe> (illustrating that there are two Volkswagen dealerships within 5 miles of the Eastern District's courthouse). In fact, one can buy a new Bug within 3 miles of the Eastern District Court of New York. *See id.*

352. *See Worldwide Locations* (visited Feb. 19, 1999) <http://www.daimlerchrysler.de/company/worldwide/worldwide_e.htm> (giving Daimler Chrysler's locations as worldwide).

353. *See Dealers Nearest You* (visited Feb. 19, 1999) <http://dealerlocate.vw.com/cgi-bin/getdealerwebtable.exe> (describing that there are two Audi dealerships within 5 miles of the courthouse).

354. *See BMW Centers* (visited Feb. 19, 1999) <http://www.bmwusa.com/centers/center.taf> (listing that there is a BMW dealership in Manhattan).

355. *See The Company, United States* (visited Feb. 19, 1999) <http://www.siemens,de/en/the_company/areitsgebiete/index.html> (describing products made by Siemens).

356. *See Business Scene Management Report* (visited Mar. 9, 1999) <http://www.krupp.com/GB98/eng/lage2.htm> (describing its NAFTA market).

357. *See Henkel Worldwide, Henkel Group* (visited Feb. 19, 1999) <http//www.henkel.com/intl/henkel.html> (illustrating Henkel's product line).

358. *See Leica USA* (visited Feb. 19, 1999) <http://www.leica-camera.com/usa/index.htm> (stating that Leica has a gallery in New York).

359. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (ruling that for a state to subject a foreign defendant to its jurisdiction, the due process clause requires "'traditional notions of fair play and substantial justice'"); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (finding that a defendant's conduct and its ties to the forum state determine if it can be subject to a foreign forum's court).

3. The Universality Principle and the Political Question Doctrine

Traditionally, when a court is determining whether it has jurisdiction, it considers whether it is infringing on another judicial or political institution's expressed powers.[360] The court conducts a two part analysis when determining whether it is interfering with another institution's expressed powers.[361] The court first asks whether, on the national level, granting jurisdiction would violate the separation of powers between other branches of government.[362] Second, it asks whether, on the international level, granting jurisdiction interferes with the equilibrium of the world legal order.[363] As in the *Pollack* case, where the forum court has no tie to the offense at issue, a court traditionally will not grant jurisdiction for fear that it will interfere with the institutions of either one of these spheres.[364] Under the universality principle, however, courts are given authority to hear claims of a severe nature despite the fact that the court has no nexus with the action.[365]

Courts of various states have asserted jurisdiction using the universality principle when they believed that the accused is "an enemy to all people."[366] Universal Jurisdiction was first used to assert jurisdiction over

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360. *See* Randall, *Federal Questions, supra* note 290, at 415 (discussing the consequences of invoking jurisdiction in an international human rights case).

361. *See id.* (stating a court must determine whether it is upsetting the division of authority among the local and foreign spheres, as well as political and legal spheres).

362. *See id.* (relating that in our domestic system of justice there are concern for federalism and separation of powers). In light of these concerns, however, under 28 U.S.C. § 1331 the federal judiciary has authority to hear human rights cases as compared to state courts or the other political offices. *See id.*

363. *See id.* (describing how a federal court should determine whether it has legitimate authority over "human rights claims not just vis-a-vis the United States legal system, but also vis-a-vis the world legal order").

364. *See id.* at 416-17 (listing the traditional basis for domestic court jurisdiction as the territoriality principle, "the nationality principle, the passive personality principle, and the protective principle").

365. *See id.* at 416 (asserting that universality applies to a "limited array of offenses that strike at the foundations and first principles of the world legal order").

366. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) (ruling that the conviction of a man kidnapped from Mexico and brought to the United States by DEA agents comported with international law); Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (citing the Supreme Court as ruling that "pirates were '*hostis humani generis*' (an enemy of all mankind)"); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (ruling that the "torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind"); *In re* Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985) (stating that under the concept of universality, Israel has jurisdiction over a Holocaust prison guard); United States v. Layton, 509 F. Supp. 212, 215 (N.D. Cal. 1981) (recognizing the universality principle to invoke jurisdiction over a man who killed a U.S. politician in Guyana). Another case involving the universality principle is the Adolf Eichmann case. *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Trans-*

pirates.[367] The two long standing offenses that invoke the universality principle are slavery and piracy, but the list is expanding along with the expansion of international law.[368] The behavior of Nazi industrialists during WWII should be added to the category of violations that invoke the universality principle.[369] Surely, the behavior of the defendant companies in *Pollack* invokes universal jurisdiction.

There are two arguments against asserting universal jurisdiction against the Nazis.[370] The first argument is that pirates are different from the Nazis in that they committed their crimes on the seas where there is universal jurisdiction, while the Nazis committed their crimes in a certain state's territory.[371] However, this distinction loses its appeal when one realizes that it is the act itself that triggers universality, rather than the location of the violation. The second argument is that the acts of pirates are a private action while the acts of the Nazis were under governmental power.[372] This distinction seems to strengthen the *Pollack* plaintiffs assertion that the *Pollack* court has jurisdiction because the defendants are private parties, not a government. The defendant corporations followed the advancing German army into Poland, where they decided to build factories and enslave Jews and others from Nazi concentration camps. Both piracy and slavery are the two oldest and most accepted categories

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formation, 106 YALE L.J. 2009, 2046 n.150 (1997) (describing hold the universality principle was considered in Eichmann's case). Eichmann, a Nazi leader, oversaw the extermination process of the Jews during the Holocaust. *See* Andrew David Wolfberg, *Israel v. Ivan (John) Demjanjuk: Wachmann Demjanjuk Allowed To Go Free*, 17 LOY. L.A. INT'L & COMP. L.J. 445, 453 (1995). Ten years after Nuremberg and escaping the allies, holocaust survivors found him in Argentina, kidnapped him and brought him to Israel. *See id.* at 454. The Israeli Court based jurisdiction on universality. *See id.* at 455. A more recent case raising universality, involves Augusto Pinochet, Chile's former dictator, who committed crimes against humanity during his tenure. *See* John Bolton, *General Pinochet's Political Persecution*, AUSTL. FIN. REV., at 13, *available in* 1999 WL 5065221. Pinochet, at the time this paper was written, was in England. *See id.* And, a Spanish magistrate had asked for Pinochet's extradition to Spain based on the universality principle. *See id.*

367. *See* Randall, *Universal Jurisdiction*, *supra* note 291, at 791 (describing how "[e]very state has long had legislative, adjudicatory, and enforcement jurisdiction over all piratical acts on the high seas, even when neither the pirates nor their victims are nationals of the prosecuting state and the offense has no specific connection to the prosecuting state").

368. *See id.* at 790-91 (adding to piracy and slavery the offenses of terrorism, apartheid, and torture).

369. *See id.* at 803 (making the comparison between piracy and Nazi crimes).

370. *See id.* at 804 (noting the differences between piracy and war crimes, but emphasizing the similarities of the egregious acts).

371. *See id.* (arguing that it should not be the jurisdiction in which a ship is registered that triggers jurisdiction, but the act).

372. *See id.* at 804 (stating that the post-war tribunal ignored this distinction).

of violations for which the universality principle is invoked. The defendants' actions fit the characteristics of both categories.

D. *Statute of Limitations*

A statute of limitations issue emerges in the *Pollack* claim because the occurrence in question accrued over fifty years ago.[373] The rationale for dismissing a case based on statute of limitations is to prevent stale claims.[374] Therefore, this issue can also be a significant barrier for other types of human rights claims.[375] This same question was an issue in both the Swiss Bank cases[376] and the *Fishel*[377] case. In *Fishel*, Judge Longstaff cited statute of limitations as one of the reasons for deciding the case in the defendants' favor.[378] The Swiss Bank plaintiffs were prepared, if the situation arose, to argue that equitable principles barred the defendants from making a statute of limitations argument.[379] The same equitable arguments available to the Swiss Bank plaintiffs are available to the *Pollack* plaintiffs.

However, there is no provided statute of limitations for Section 1331.[380] Generally, when Congress provides a statutory civil cause of action, as in the case of Section 1331, and there is no statute of limitations provided, the district court must find a statute of limitation from a state

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373. *Cf.* Bilenker, *supra* note 343, at 275 (discussing how the defendant Swiss Banks reserved the right to argue statute of limitations).

374. *See* Allbrand Appliance & Television Co., Inc. v. Caloric Corp., 875 F.2d 1021, 1025 (2d Cir. 1989) (reiterating that statutes of limitations prevent stale claims).

375. *See* 28 U.S.C. § 1350 (1994) (providing a ten year statute of limitation for certain types of human rights claims). *See also* Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) (describing how a victim of torture has a claim under the Torture Victim act, which bars claims over ten years old); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547-52 (N.D. Cal. 1987) (discussing the statute of limitations issue in an international human rights claim involving an Argentinian General who allegedly tortured the plaintiffs); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 259-60 (D.C. 1985) (discussing how statute of limitations could be an issue if the plaintiff, who was abducted by the Russians is dead).

376. *See* Bilenker, *supra* note 343, at 251 (discussing the statute limitations issue in the Swiss Bank Cases).

377. *See Holocaust Lawsuit Thrown Out Judge Rules Federal Court Lacks Jurisdiction in Survivor's Case*, OMAHA WORLD-HERALD, Mar. 17, 1998, at 13 (reporting Judge Longstaff as saying that besides jurisdiction, statute of limitations would also be a problem in this case).

378. *See id.*

379. *See* Bilenker, *supra* note 343, at 251 (discussing the statute of limitations issue in the Swiss Bank Cases). The Swiss Bank cases never went to trial because the parties settled out of court. *See Jewish Groups OK Swiss Holocaust Fund Plan; German Banks Seek to Dismiss $18 billion Suit* (visited Nov. 21, 1998) <http://www.cnn.com/WORLD/europe/9811/21/holocaust.01/.

380. 28 U.S.C. § 1331 (1994).

statute that correlates with the federal statute.[381] An exception to the general rule of adopting the correlating state statute arises in situations where adopting the state statute will defeat legislative intent or where there is a need for uniformity of laws.[382] Consequently, courts can look to several different sources for the limitations statute that correlates most closely with the legislative intent of Congress.[383]

The *Pollack* plaintiffs will fight a losing battle in trying to find a statute of limitations period longer than fifty years to prevent their cause of action from tolling. The Torture Victim Protection Act, which was adopted into the notes of the Alien Tort Claims Act in 1992, has a statute of limitations period of ten years.[384] The Torture Victims Protection Act is a

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381. *See* Agency Holding Co. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 146 (1987) (stating that state law is almost always applied when there is no statute of limitations included in a federal claim); Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (deciding the test courts should follow when trying to determine which state statute of limitations law applies best). There is a three-step process for determining the correct statute of limitation. *See* 42 U.S.C. § 1988 (1994), *construed in* Garcia, 471 U.S. at 268-68. First, the court ruled that one must look to the federal law for guidance. *See id.* Second, when no guidance is given in the federal laws, courts should look to state common law. *See id.* However, there is a third step that instructs courts not to apply state law if it is inconsistent with federal law. *See id.* There is another three-step process to determine the appropriate state law. *See id.* at 268. The court stated that one must first consider whether state law or federal law governs the characterization of [the federal statute] for statute of limitation purposes." *Id.* When federal law is applied, the question becomes whether all federal claims under the federal statute should be classified in that manner or whether factual and theoretical differences between the cases should require an evaluation of each individual case. *See id.* Last, the court must decide the essence of the case in order to find the most analogous statute of limitations. *See id.*

382. *See Agency Holding Corp.*, 483 U.S. at 150 (ruling that another federal statute is better suited to provide a statute of limitation in RICO cases); *Wilson,* 471 U.S. at 267 (citing 42 U.S.C. § 1988 (1994)); Xuncax v. Gramajo, 886 F. Supp. 162, 190 (D. Mass. 1995) (stating that federal law should be applied if applying state law would defeat the purpose of the federal statute or there is a special need for uniformity); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987) (recognizing that "where a rule from elsewhere in federal law provides a closer analogy than available state statutes, and better accommodates federal policies and the practicalities of litigation, a federal limitations period may better bridge the gap left open by Congress").

383. *See Agency Holding Corp.*, 483 U.S. at 147 (formulating that once the court has decided "whether all claims arising out of the federal statute 'should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case'" then the court should decide whether to use state or federal law); *Suarez-Mason*, 672 F. Supp. at 1547-48 (considering state, federal and international law in its quest for the correct statute of limitations).

384. *See* 28 U.S.C. § 1350 note § 2(a)(2) (1994).

good match with the *Pollack* claims and should be a good candidate for a court to use as the statute of limitations in the present case.[385]

At first glance, it would seem that the plaintiffs' claims have tolled. However, the plaintiffs allege that their claims should not toll because of equitable tolling principles.[386] The *Pollack* plaintiff's complaint alleges that equitable tolling estops the defendants from arguing that the applicable statute of limitations prevents the plaintiffs' case from continuing.[387] In the past, the Second Circuit has adopted New York's equitable estoppel principles.[388] "[A] party may be estopped from raising a statute of limitations defense where his fraud, concealment, or deception prevented the plaintiff from timely filing his claim."[389] The *Pollack* complaint alleges that there was significant concealment on part of the defendant corporations.[390] Additionally, the plaintiffs allege that documents being held in archives were only made public in 1995.[391] These allegations have been supported by at least two major news sources.[392] Only now, after the Cold War has ended, are documents being released which confirm what people originally suspected are true.[393] The atrocities did occur on a monstrous scale.

E. *Forum Non Conveniens*

A defendant invokes the doctrine of *forum non conveniens* to argue the dismissal of a case where there is another forum which, potentially, has

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385. *Cf. Xuncax*, 886 F. Supp. at 191 (adopting TVPA as the statute of limitations for a Tile 28, Section 1350 claim).

386. *See* Class Action Complaint 20, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (asserting that the defendants, "with the active assistance of others, concealed information from plaintiffs").

387. *See id.* (stating that relevant facts about the case were not released until 1995).

388. *See* Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983) (adopting New York's equitable estoppel principles).

389. Independent Order of Foresters v. Donald, Lufkin, & Jenrette, Inc., 157 F.3d 933, 942 (2d Cir. 1998) (describing New York's tolling principles).

390. *See* Class Action Complaint 20-21, Pollack v. Siemens AG, No. 98CV-5499 (E.D.N.Y. filed Aug. 30, 1998) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (alleging facts that support a tolling defense to a statute of limitations).

391. *See id.*

392. *See German Official to Push Holocaust Reparations Plan*, *supra* note 14 (stating that after the collapse of communism additional documents were discovered in East German intelligence Piles); Alissa Kaplan, *Why Pursue Assets Now?* (visited Feb. 17, 1999) <http://abcnews.go.com/sections/world/DailyNews/neutrals1031_whynow.html> (reporting that documents that are now being released are conclusive about the role of industry in the Holocaust).

393. *See Dateline NBC*, *supra* note 41 (stating that dirty business secrets of WWII were being released from files sealed long ago).

jurisdiction over the case.[394] The courts consider whether the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience."[395] Another factor the court will consider is whether the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."[396]

District courts have wide discretion in determining whether a case must be dismissed due to the doctrine of *forum non conveniens*.[397] Interestingly, the fact that a court has proper venue and jurisdiction is not a determinative factor in the district court's analysis of the doctrine.[398] The court considers the argument on a "case by case basis."[399] At the same time, courts recognize the strong presumption in favor of a plaintiff's selection of forum and the burden is on the defendant to prove that there is another appropriate forum.[400]

The cause of action in *Pollack*, as well as other human rights cases, is statutorily provided. If *forum non conveniens* is the reasoning for a court's dismissal of a human rights claim then a federal common law notion would be defeating the legislative intent of Congress to allow such claims.[401] Further, the federal interest in protecting human rights that the United States is obligated to enforce will be overridden by this notion of common law.[402] As a policy matter, *forum non conveniens* should be abolished in international human rights cases.[403]

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394. *See* Scottish Air Int'l Inc. v. British Caledonian Group, 81 F.3d 1224, 1232 (2d Cir. 1996) (citing the discussion of *forum non conveniens* from Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, 712 F.2d 11, 14 (2d Cir. 1983)).

395. *See* Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947) (granting a defendant's motion to dismiss based on the doctrine of *forum non-conveniens*).

396. *See id.*

397. *See id.* (ruling that a district court's ruling regarding forum non-conveniens must only be overturned if there is a clear abuse of discretion).

398. *See id.* (stating the determinative factors are access to evidence, cost to witnesses, and other "private and public interest factors").

399. *See* Mercier v. Sheraton Int'l, Inc., 981 F.2d 1345, 1349 (1st Cir. 1992) (defining the burden placed on the defendant asking for removal from the local forum as substantial unfairness).

400. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (stating the "plaintiff's choice of forum should rarely be disturbed").

401. *See* Boyd, *supra* note 19, at 75-78 (stating the courts should adopt reasoning from recent cases which have abolished *forum non conveniens* for cases involving the Clayton Act).

402. *See id.* (describing how certain federal regulations override common law doctrines).

403. *See id.* at 84 (stating that there are other safeguards besides *forum non conveniens* that a court can use to dismiss a case if it is frivolous).

The defendants will likely argue that Germany is the proper forum for this case; especially in light of similar slave labor cases recently decided by a German court.[404] However, when considering the extenuating circumstances of this case, the court should maintain the presumption in favor of the plaintiffs. The United States is a suitable venue for this case. Both parties have a presence in the United States. The defendants engage in millions of dollars worth of business in the U.S. and there is an extensive amount of evidence and a great number of experts on the Holocaust in the United States. Furthermore, most of the witnesses, the victims themselves, reside in the United States.

IV. FOCUSING ON THE *POLLACK* PARTIES—HOW THE *POLLACK* CASE FITS IN THE CHAIN OF HUMAN RIGHTS PROTECTION

The *Pollack* court is only one of the latest links in a legal and jurisprudential chain that dates back to the days after WWII.[405] At the end of the war, the civilized nations of the world were able to truly gauge the atrocities perpetrated by the Nazi regime upon the Jewish people.[406] With the realization of the magnitude of the crimes committed against all humankind came a sense that it was necessary to set boundaries and parameters within which nation states could operate.[407] For example, one of the vehicles through which nations committed themselves to preventing any future re-occurrence of the events in WWII was the U.N. charter.[408]

The United Nations Charter encompasses minimal standards of human rights.[409] The United States bound itself to observe and enforce these

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404. *See Bonn Must Pay Auschwitz Slave Labourer Compensation,* DEUTSCHE PRESSE-AGENTUR, Nov. 5, 1997, *available in* LEXIS, News Library, International News. A German court ruled that one out of 22 women who were slave laborers should receive compensation for her time spent as a slave laborer at Auschwitz. *See id.*

405. *See* Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants,* 11 CONN. J. INT'L L. 199, 278 (1996) (explaining that the death camp cases arising out of WWII serve as precedent in cases involving the mistreatment of civilians).

406. *See* Stephen A. Denburg, Note, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property,* 18 B.C. THIRD WORLD L.J. 233, 235 (1998) (observing that it was only after WWII that the full effect of the Holocaust on European Jewry was clear to all).

407. *See* Buergenthal, *supra* note 20, at 6 (asserting that the evolution of the formalization of human rights started after WWII).

408. *See* HUMAN RIGHTS IN THE WORLD COMMUNITY, *supra* note 23, at 8 (describing how the Charter "states that a major purpose of the [United Nations] organization is to achieve and promote respect for human rights").

409. *See id.* at 286 (discussing the institutionalization of human rights standards with the U.N. Charter being the standard).

human-rights standards when it ratified the Charter and became a member of the United Nations.[410] In fact, some would argue that as a permanent member of the Security Council, the United States has a higher duty to uphold the Charter. In order to uphold the standards of human rights that have developed since World War II, many countries have internally adopted these standards in their municipal laws and constitutions.[411] However, in order to ensure that the human rights guaranteed in documents such as the U.N. Charter are safeguarded, judicial bodies, such as the court in *Pollack*, must enforce human rights standards.[412]

The *Pollack* case can and should follow the course of the *Filartiga* and *Kadic* decisions. In those landmark cases the United States judiciary chose to live up to the United States' obligations as a signatory to the United Nations Charter.[413]

The parties in *Pollack* should not cheapen the legacy of the Holocaust by squabbling over money. The parties have a higher duty to ensure justice. Genocide spurs the development of a system where the government, the main actor in the genocide, rewards a group of people or corporations who gained from the genocide.[414] Inevitably, the regimes that are the main perpetrators of the genocide are removed, but the institutions that helped perpetrate the crimes and subsequently gained from the genocide continue to hold onto their power within that society.[415] After both world wars, the corporations that helped Germany wage those wars were kept in power mainly by politicians within the United States.[416] "Thus, the law and the crime became caught in a cycle in which the law facilitated the crime and the crime, in turn, helped institutionalize a form of law with which it could coexist."[417] The *Pollack* plaintiffs and other future

410. *See id.* (describing how Article 55 and 56 of the U.N. Charter bind individual signatories to those standards).

411. *See id.* at 286-87 (using Poland, the Netherlands, and the Philippines as an example of using wording from the U.N. Charter in amendments to existing constitutions).

412. *See id.* at 287 (stating "international human rights are sought to be implemented by way of litigation in domestic courts").

413. *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 800-01 (D.C. Circuit 1984) (Bork, J., concurring) (deciding to reject international human rights standards).

414. *See* SIMPSON, *supra* note 26, at 5 (describing how German companies cooperated with the Nazis' plans of Aryanization in exchange for the government's aid in maintaining their status).

415. *See id.* at 6 (illustrating how institutions within genocidal regimes maintain their power even after regimes themselves have been removed).

416. *See id.* at 12. The Dulles brothers and others in the State Department conspired after both Wars to keep the German establishment in power with the intention of keeping West Germany strong a buffer to the Communist regime. *See id.*

417. SIMPSON, *supra* note 26, at 6.

human rights claimants should seek to stop this system of injustice, and, as such, should be fostered not hindered in their pursuits of justice.

V. CONCLUSION

As a world community, we must never forget what happened during the Holocaust and continue learning from it as a disastrous incident in world history. We can use the Holocaust's legacy to further human rights protection. Progress has been made in the human rights area in the past fifty years, but we have not gone far enough. Evidence of our failures to stop human rights violations are the atrocities in the former Yugoslavia and Africa and how helpless the world community is from stopping these horrors.[418] There are new human rights victims being born everyday. This is unacceptable.

Success by the *Pollack* plaintiffs would strike a blow against the system of justice that left war criminals without prosecution after WWI and returned the slave-master corporations of WWII to the owners who had violated millions of people's human rights. Further, a *Pollack* success would be a step toward holding violating parties responsible for the consequences of their actions. Knowing that we cannot rid the world of atrocities, we must strive to hold all violators of human rights responsible for their actions. This comment's proposal is one of the steps toward that goal.

418. *See* Diane F. Orentlicher, *Crimes Against Humanity: Nuremberg Comes Back to Haunt Pinochet*, L.A. TIMES, Dec. 20, 1998, at M1 (asserting that the world has failed "to repress 'ethnic cleansing' in Bosnia and genocide in Rwanda").